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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

## INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2004] WASCA 51

<b>JURISDICTION</b>	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
<b>CITATION</b>	:	MALIK -V- PAUL ALBERT, DIRECTOR GENERAL, DEPARTMENT OF EDUCATION OF WESTERN AUSTRALIA [2004] WASCA 51
<b>CORAM</b>	:	STEYTLER J (PRESIDING JUDGE) PULLIN J EM HEENAN J
<b>HEARD</b>	:	2 MARCH 2004
<b>DELIVERED</b>	:	1 APRIL 2004
<b>FILE NO/S</b>	:	IAC 13 OF 2003
<b>BETWEEN</b>	:	PREM SINGH MALIK Appellant AND PAUL ALBERT, DIRECTOR GENERAL, DEPARTMENT OF EDUCATION OF WESTERN AUSTRALIA Respondent

### ON APPEAL FROM:

<b>Jurisdiction</b>	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
<b>Coram</b>	:	SHARKEY P, SCOTT C, KENNER C
<b>Citation Number</b>	:	[2003] WAIRC 9090
<b>File Number</b>	:	FBA 13 of 2003

### Catchwords:

Industrial law - Application for Commission to accept referral of unfair dismissal claim out of time - Whether error of law in interpretation of legislation

### Legislation:

*Industrial Relations Act*, s 29(3)

### Result:

Appeal dismissed

Category: B

### Representation:

#### Counsel:

Appellant	:	Mr G Droppert
Respondent	:	Mr R J Andretich

*Solicitors:*

Appellant : Slater & Gordon  
 Respondent : State Solicitor's Office

**Case(s) referred to in judgment(s):**

Azzalini v Perth Inflight Catering (2002) 82 WAIG 2992  
 Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298  
 Clark v Ringwood Private Hospital (1997) 74 IR 413  
 Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51  
 Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196  
 Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106  
 Jackamarra v Krakouer (1998) 195 CLR 516  
 Kornicki v Telstra - Network Technology Group [Print P3168, 22 July 1997]  
 R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board (1965) 113 CLR 228  
 R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389  
 Tortola Pty Ltd v Saladar Pty Ltd [1985] WAR 195  
 Ward v Williams (1955) 92 CLR 496

**Case(s) also cited:**

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541  
 Cousins v YMCA of Perth (2001) 111 IR 286

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- 1 **STEYTLER J (PRESIDING JUDGE):** This is an appeal against a decision of the Full Bench of the Western Australian Industrial Relations Commission. Appeals of that kind are significantly restricted by the provisions of s 90 the *Industrial Relations Act 1979* ("the Act"). In this case, the appellant relies upon the provisions of s 90(1)(b) of the Act, which permits an appeal from a decision of the Full Bench which is "erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against". The appellant contends that the Full Bench has erred in its construction of s 29(3) of the Act.
- 2 The appellant was a teacher employed by the respondent. He taught, during 2002, at the Corrigin District High School. The principal of that school was dissatisfied with the appellant's performance. Various processes followed before the appellant was ultimately dismissed on 7 January 2003. The appellant believed that his dismissal was unfair and consequently wished to refer it to the Industrial Relations Commission under s 29(1)(b)(i) of the Act, which provides for the referral of such a claim by a dismissed employee. By s 29(2) of the Act a referral under subs (1)(b)(i) was required, subject to s 29(3), to be made not later than 28 days after the date on which the employee's employment is terminated. That meant that the referral had to be made by 4 February 2003. It was in fact made three days later, on 7 February 2003. The appellant consequently made an application under s 29(3) of the Act, which reads as follows:
- "The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."
- 3 A single Commissioner, Commissioner Harrison, made an order accepting the referral out of time. However, the respondent appealed against her decision to the Full Bench under s 49 of the Act. The Full Bench allowed the appeal and varied the order below by dismissing the appellant's application under s 29(3).
- 4 Before turning to consider the grounds of appeal to this Court, it is necessary to say a little more about the proceedings before Commissioner Harrison and about the reasoning of the Full Bench.
- 5 The appellant's application under s 29(1)(b)(i) of the Act was accompanied by a schedule which read, so far as is presently relevant, as follows:
5. On 22 November 2002 a student assaulted the applicant at Corrigin District High School. This student was known for his threatening and violent behaviour and also assaulted the other staff members at the school. This student provoked other students to misbehave, and the applicant became harassed regularly whilst conducting his classes.
  6. As a result of being the subject of such harassment, the applicant suffered stress, anxiety and lacked confidence in conducting his classes.
  7. The applicant raised these issues and a number of other professional development issues with the Principal and Deputy Principal of Corrigin District High School.
  8. The applicant contends that the Principal, the Deputy Principal and the respondent, as his employer, did not follow the policies and guidelines of the Department of Education in dealing with the issues raised by him, and subsequently blamed the student's behaviour on the applicant saying that he was performing unsatisfactorily as he relied heavily on administration to help control his troublesome classes.
  9. On 2 December 2002 the applicant was advised by letter from the respondent that he had formed the view that the applicant's performance was substandard within the meaning of section 79(1) of the *Public Sector Management Act 1994* and giving him an opportunity to respond to the finding and intended penalty.
  10. The applicant replied to the respondent by letter dated 20 December 2002.
  11. By letter dated 2 January 2003 the applicant was informed by the respondent that, despite his response, his employment was terminated pursuant to section 79(3) of the *Public Sector Management Act 1994*, effective from 7 January 2003.
  12. The applicant is aggrieved by the decision of the respondent for the following reasons:
    - (i) The respondent did not follow its own policies, guidelines and procedures in addressing the original issues raised by the applicant;

- (ii) The respondent did not apply the provisions of the *Public Sector Management Act 1994* in terminating the applicant's employment or alternatively applied them in a manner which denied the applicant procedural fairness."
- 6 No affidavit was lodged by the appellant with his application under s 29(3). However, when the application came on for hearing, his solicitor handed up, by consent, an affidavit sworn by the appellant's former legal representative, Mr Mark Cox, in support of the application. On the same morning the respondent's counsel handed up, also by consent, two affidavits (at least one of which had not been seen by the appellant's lawyer until that morning) in opposition to the application. Neither party has seen fit to place the affidavits before us, but we were told that we could safely accept the description of their contents given respectively by Commissioner Harrison and the Full Bench.
- 7 The affidavit evidence appears to have established that no fault could be ascribed to the appellant in respect of the delay. On 8 January 2003 the appellant's wife telephoned a representative of the respondent, asking how much time the appellant had within which to challenge the decision to dismiss him. Then, on 14 January 2003, the appellant instructed Mr Cox to bring the application under s 29(1)(b)(i). However, Mr Cox missed the statutory deadline because his heavy workload caused him to overlook it. It was only when the appellant telephoned Mr Cox on 6 February 2003 in order to obtain a copy of the application that he discovered that it had not been lodged. There is no suggestion that the respondent was prejudiced by the delay.
- 8 At the hearing before Commissioner Harrison the appellant's solicitor contended that the applicant had an arguable case and "some legitimate complaint". However, he adduced no evidence on the merits, presumably relying upon s 26(1)(b) of the Act, which provides that, in the exercise of its jurisdiction under the Act, the Commission "shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just". He began to make submissions from the bar table in respect of matters not covered by the schedule attached to the application. When the Commissioner questioned him as to the propriety of this, the appellant's solicitor moved to the schedule itself, reciting some of the facts therein set out. He went on to say:
- "Now, because of the haste with which the application was prepared, it's clear that that's not a full development of ... [the appellant's] case ... and certainly if what ... [the appellant] is saying is true, there is the potential for him to be successful in his unfair dismissal claim. ... It is not without merit ...".
- 9 When asked by the Commissioner to what par 12(i) of the schedule related, counsel for the appellant said that the contention there advanced related to "the complaint about the harassment from the student and also not being supported by the principal and the deputy principal". Once again, counsel for the appellant apologised for the "haste with which ... [the application] was obviously prepared".
- 10 The Commissioner then asked counsel for the applicant to what par 12(ii) of the schedule related and was told by the solicitor that he did not "have the knowledge of what that ... was referring to".
- 11 Counsel for the respondent then made her submissions. These encompassed a relatively brief summation of the facts set forth in the affidavit evidence filed on behalf of the respondent which, she contended, supported the proposition that the applicant had been properly dealt with and had no cause for complaint. That evidence was to the effect that the appellant had been unable to demonstrate satisfactory skills in the area of classroom management and had demonstrated difficulty in managing student behaviour. As has been mentioned by Pullin J (I have had the considerable advantage of reading both his Honour's judgment and that of E M Heenan J), the respondent's affidavits also revealed that the applicant had been provided with a copy of the Department of Education's policy concerning unsatisfactory and sub-standard performance of the teaching staff and that correspondence had been forwarded to him dated 3 October 2002, informing him that the Department had received a report from the principal of the Corrigin School alleging that his performance was sub-standard. As Pullin J has said, the affidavits showed that after that report had been completed, the appellant informed the principal, on 23 October 2002, about harassment by students outside of school hours, although the only out-of-hours harassment referred to in the application is that arising from the assault on 22 November 2002, some time after the completion of a performance review conducted in respect of the applicant by the school itself. The respondent's affidavit evidence also established that it had followed appropriate processes in dealing with the appellant, including those provided for by the *Public Sector Management Act 1994*.
- 12 In the course of a replying submission the solicitor for the applicant said that, as had been revealed by the respondent's submissions, the appellant had "at every stage ... challenged the assessments that were made of him".
- 13 Commissioner Harrison, in arriving at her decision, said that she took into account "whether there was an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he was unhappy with his termination and that he would contest his termination and prejudice to the respondent". She said that, in applying those guidelines (which she drew from a recent decision of the Commission), she was "mindful that there is a 28-day time frame to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless there is good reason to do so".
- 14 She went on to say that the evidence established that the delay was not attributable to the appellant, who had acted promptly to pursue his claim, that there remained a "live issue" to be dealt with on the merits, that the respondent was aware that the appellant was considering a challenge to the termination of his employment and that there was no significant disadvantage to the respondent if the application should be allowed. She said, so far as the merits were concerned, the following:
- "The respondent maintains that there was no merit at all to the applicant's claim that he had been unfairly terminated. Even though detailed submissions were made about the process that the respondent undertook in relation to the applicant's termination, I am satisfied that there is some doubt about at least one aspect of the applicant's termination sufficient to attract a review by the Commission. The applicant relies on the issue that the respondent did not deal adequately with him being the subject of harassment by students at the workplace. The respondent claims that it was not aware of this issue when deciding to effect the applicant's termination. Given this, it is my view that this remains a live issue. I express no view in relation to the other issues relied upon by the applicant relating to his claim. In the circumstances the applicant has established that there could well be an arguable case in relation to this one matter."
- 15 The Full Bench, in allowing the appeal against the Commissioner's decision to extend time, relied heavily upon the fact that the appellant had advanced no affidavit evidence in support of the merits of his claim that his dismissal was unfair.
- 16 The President, after a careful evaluation of the facts and findings at first instance, and after considering much of the relevant case law, set out, in par 81 of his judgment, a number of "principles, practices and considerations" which, he said, were relevant in an application under s 29(3). His Honour included amongst these the consideration that there is "a positive burden on the applicant to establish that the discretion ... should be exercised in his/her favour" and the consideration that an applicant "will, in many cases, be required to establish that he/she has a case on the merits". He went on to say, in this last respect:

"That is that the case has merit and is likely to succeed, not that it is barely likely to succeed or unlikely to succeed. (This will not, however, require a full investigation of the merits (see *Lucic v Nolan & Ors* 45 ALR 411 at 416 - 417 per Fitzgerald J (FC))).

I do not use the word 'arguable' in this context because that is a term which applies more to matters of law and therefore to a proceeding such as an appeal. The merits of the case at first instance which depends, more often than not, on the evidence as well as the law is a different matter and should not be characterised as merely 'arguable' or not."

- 17 Notwithstanding his enunciation of a test in which "a case on the merits" was required to be established "in many cases", the President found, in par 92 of his reasons, that it would be "patently unfair to accept the referral where no merit in the claim was established". He had earlier found, in that respect, that (par 83(f)):

"There was nothing in the evidence or no submission which could properly lead the Commission at first instance to conclude that ... [the appellant's] case was not lacking in merit. At best, and it should have been so found, the case for ... [the appellant] was barely arguable or weak. The test which was applied should not be whether there was a live issue, and the Commissioner erred in so finding."

- 18 The President had also earlier found that, while the Commission was entitled to act upon the assertions of advocates without hearing other evidence, it would be at least imprudent on the part of the Commission not to examine the matter further if those assertions were challenged (par 67) and that it would not be prudent for the Commission to accept assertions from the bar table against evidence on oath or affirmation (par 68).

- 19 He went on, a little later, to say (par 78) that:

"There was no attempt at first instance to adduce the necessary evidence where evidence in the face of the sworn evidence of the ... [respondent's] witnesses was patently required in order to enable ... [the appellant] to discharge his burden."

- 20 Commissioner Kenner (with whom Commissioner Scott was in agreement) likewise placed considerable emphasis upon the appellant's failure to advance any affidavit evidence in respect of his claim that he had been unfairly dismissed. He referred to an earlier decision of his in *Azzalini v Perth Inflight Catering* (2002) 82 WAIG 2992, in which he had said that considerations "relevant to whether it would be unfair to not extend time" included "the merits of the substantive application in the sense that there is a sufficiently arguable case". However, he went on to make a number of comments from which it might be inferred that he considered that an applicant is obliged to lead evidence as to the merits in order to discharge his or her obligation of satisfying the Commissioner that there was a sufficiently arguable case. He said, in par 113:

"Finally, and most importantly however, as to the merits of the substantive application, in my view, on the evidence, it was open for the Commissioner to find that the respondent's claim lacked any merit at all. This is because not only did the respondent not lead any evidence as to the merits, which he was obliged to do given that he bore the onus of persuading the Commissioner at first instance to extend time, but there was also evidence adduced by the appellant positively against the assertion that the respondent was unfairly dismissed."

- 21 Also, after referring to evidence which had been tendered on behalf of the respondent, which, he said, left it open to the Commissioner to find that the appellant had been fairly adjudged to have demonstrated unsatisfactory performance and to have been afforded due process and natural justice, he said (pars 115 and 116):

"115. That being so, and in the absence of any evidence from the respondent and the discharge of the onus that rested on him, apart from assertions from the bar table which should not be accepted in the face of sworn evidence to the contrary, in my view, the respondent failed to demonstrate that the application at first instance had merit. Indeed, as I have observed above, the evidence from the appellant, uncontroverted, established to the contrary.

116. In these circumstances, the Commissioner should have found that the respondent at first instance had not established on the evidence any merit in his claim. Despite the short length of the delay and the reason for the delay not being attributable to the respondent, the absence of established merit in the respondent's claim meant the discretion to accept the referral out of time pursuant to s 29(3) of the Act should not have been exercised in this case."

- 22 Commissioner Kenner went on to say that he "would therefore uphold the appeal" (par 117).

- 23 The sole ground of appeal to this Court is that the Full Bench erred in law in interpreting s 29(3) by holding that the appellant had a positive obligation to establish the merit of his claim.

- 24 It seems to me necessarily to follow from what was said by the President and by Commissioners Kenner and Scott that each of them found that the appellant could not succeed without establishing a sufficient case on the merits and that this could not be done other than by way of affidavit evidence in circumstances in which there was sworn evidence contradicting mere assertions made on his behalf from the bar table.

- 25 In my respectful opinion, that reading of s 29(3) adds an impermissible gloss to the simple meaning of its words. The Commission is empowered to accept a late referral if it would be "unfair" not to do so and, while an assessment of the merits "in a fairly rough and ready way" (see *Jackamarra v Krakouer* (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s 29(3) which imports any obligation, on the part of an applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s 27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success. However, that is a very different proposition from one to the effect that an applicant has, in every case, an obligation to show that he or she has some prospect of success.

- 26 Like E M Heenan J, I consider that the principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 are apposite. As E M Heenan J has said, Marshall J there identified the following six "principles" (at 299 - 300):

1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.

4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
  5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
  6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."
- 27 Those "principles" or considerations are not exhaustive and, putting to one side the uncontested proposition that there must be something positively to satisfy the Court that it would be unfair not to accept the referral out of time, none of them is necessarily decisive and each case will turn upon its own individual facts and circumstances.
- 28 It follows that, like Pullin J, I am of the opinion that the Full Bench erred in law by misconstruing s 29(3) of the Act. However, unlike Pullin J, it seems to me that the matter should be referred back to the Commission for reconsideration. While I am in a minority in this respect, I will, very briefly, express my reasons for arriving at that conclusion.
- 29 As I have said, Commissioner Harrison, at first instance, expressed an opinion on only one issue on the merits. She did so in circumstances in which counsel for the applicant had patently done insufficient preparation to enable him to provide any real assistance in that regard, the schedule having presumably been prepared by a different solicitor, Mr Cox. The issue on which she expressed an opinion was that which, as I have also said, she described as a "live issue", being that relating to the alleged failure of the respondent to deal adequately with the fact of the applicant having been the subject of harassment by students at the workplace. That is the issue dealt with in par 5 of the schedule attached to the applicant's application. While it is unclear from that paragraph when that harassment took place, I infer, from the manner in which submissions were made on the applicant's behalf before Commissioner Harrison, that it was said to have taken place throughout the period, in 2002, in which the appellant taught at Corrigin District High School. It may be, as the President said, that this raised only a weak case (albeit the Commissioner did not say this, and it would have been difficult for her to arrive at any firm conclusion in that regard in the absence of a much fuller hearing). It may also be so that it was imprudent on the part of Commissioner Harrison not to examine the matter further in the absence of affidavit evidence from the applicant on the merits (as to which see *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228 at 243, per Barwick CJ), albeit, it should not be forgotten, she was, as I have said, faced with a solicitor who had, that morning, for the first time been confronted with some, or all, of the respondent's affidavit evidence and who was, through no fault of the appellant, patently in no position to provide any real assistance in respect of the merits of the application under s 29(1)(b)(i). However, none of this meant that the appellant must inevitably fail in his application. Commissioner Harrison at first instance made no finding that it had positively been shown that the appellant's unfair dismissal claim had no prospects of success and nor, in my respectful opinion, was it open either to her or to the Full Bench to arrive at that conclusion on the basis of the limited materials which were before the Commission, more particularly given the haste in which the application for an extension of time was prepared and the consequential lack of any real preparation on the part of the appellant's new solicitor as regards the merits of the appellant's claim. That being so, some other basis for upsetting the exercise, by Commissioner Harrison, of her discretion was required to be shown.
- 30 I would consequently have allowed the appeal and returned the matter to the Full Bench for reconsideration in accordance with these reasons.
- 31 **PULLIN J:** This is an appeal against a decision of the Full Bench of the Western Australian Industrial Relations Commission, dated 20 August 2003. The decision, in effect, quashed an order of Commissioner Harrison extending time for the appellant to refer to the Commission, his claim that he had been unfairly dismissed from his employment.
- 32 The background is as follows. The appellant was a teacher employed by the respondent. He was dismissed early in January 2003. He gave his solicitors instructions to refer his claim for unfair dismissal to the Commission well within the 28-day time limit imposed by s 29(2) of the *Industrial Relations Act ("Act")*. The appellant's lawyers overlooked the time limit, and three days after the expiry of the time limit, the appellant referred his claim to the Commissioner and applied for an order that the Commission accept the referral out of time, pursuant to s 29(3) of the Act. That subsection reads:
- "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."
- 33 In support of the application for extension of time, the appellant filed affidavit evidence by the solicitor, explaining that pressure of work had caused him to overlook the time limit. However, the appellant filed no affidavit dealing with the merits of the claim. The respondent filed affidavits giving a detailed account of the dealings between the parties which, if uncontradicted, showed that the substantive claim had no merit because the appellant had not been unfairly dismissed. The only material that the appellant relied upon in relation to the issue of merit, was a schedule to the substantive application or referral, which stated that on 22 November 2002, a student assaulted the applicant at the Corrigin District High School, where he was working; that the student provoked other students to misbehave; that the appellant was harassed regularly whilst conducting his classes; that as a result of being subject to such harassment, the applicant suffered stress and anxiety and lacked confidence in conducting his classes; that the appellant raised these issues, and a number of other professional development issues, with the Principal and Deputy Principal of the school; that the Principal, Deputy Principal, and respondent, as employer, did not follow the policies and guidelines of the Department of Education in dealing with the issues raised by him and subsequently blamed the student's behaviour on the appellant, saying that he was performing unsatisfactorily because he relied heavily on administration to help control his troublesome classes. The schedule further stated that on 2 December 2002, the appellant was advised by letter from the respondent, that he had formed the view that the appellant's performance was sub-standard within the meaning of s 79(1) of the *Public Sector Management Act 1994*, and giving him an opportunity to respond to the finding and intended penalty. The appellant replied by letter dated 20 December 2002, and by letter dated 2 January 2003 the appellant was informed that, despite his response, his employment was terminated. The appellant complained in the schedule that he was aggrieved by the decision because the respondent did not follow its own policies, guidelines and procedures in addressing the original issues raised by the appellant, and that the respondent did not apply the provisions of the *Public Sector Management Act 1994* in terminating the appellant's employment, or applied them in a manner which denied the appellant procedural fairness.
- 34 I should at this point mention something that was said by Brennan CJ and McHugh J in *Jackamarra v Krakouer* (1998) 195 CLR 516 at [10]. They said:
- "Given the practice in hearing applications for extension of time, the rules of procedural fairness require that an appellate court should not determine the application on the details of the evidence (if they have been provided) or the lack thereof unless counsel has been given fair notice that the court intends to take that course."
- 35 In this case, the appellant came to the hearing before Commissioner Harrison, aware that the respondent intended relying upon affidavit evidence which, if accepted, strongly suggested that the appellant's substantive application could not succeed. The appellant took no steps to file any affidavits to contradict anything which had been said in the respondent's affidavits. During

the course of the hearing before Commissioner Harrison, counsel for the appellant began explaining the appellant's case in a way which went outside the schedule to the substantive application. The Commission, under the Act, is entitled to act on the assertions of advocates without hearing other evidence, but if the assertion is challenged, it would be imprudent on the part of the Commission not to examine the matter further: see *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228. Commissioner Harrison pointed out that counsel's explanations were "assertions from the bar table" and that they were not included in the schedule attached to the application. Counsel for the applicant then reverted to the schedule to give an account of the proposed case of unfair dismissal. Counsel for the appellant did not ask for an adjournment to file affidavits. In the circumstances, therefore, the appellant had fair notice that the issue of merit would be decided by reference to the affidavits (and the schedule) and not by reference to counsel's assertions from the bar table.

- 36 Commissioner Harrison made an order extending time.
- 37 The affidavits filed by the respondent revealed that Mr Malik had been provided with a copy of the Department's policy concerning unsatisfactory and sub-standard performance of the teaching staff, and this had been provided on 13 June 2002; and that correspondence had been forwarded to the appellant dated 3 October 2002, outlining that the Department had received a report from the Principal of the Corrigin School, alleging that Mr Malik's performance was sub-standard. The affidavits showed that after that report, the appellant had advised the Principal on 23 October 2002 about harassment by students outside of school hours, but that conduct is not referred to, or relied upon, in the substantive application by the appellant. The appellant's statement about the assault on 22 November 2002 was shown by the affidavits to be a date not only after the commencement of the appellant's performance review at the school, but also after the completion of the review which was finalised in August 2002. The *Public Sector Management Act* provides for a process to be complied with if sub-standard performance of an employee is alleged. It provides for an investigation. The Department itself had established a process to be completed prior to the commencement of the investigation under the Act. That process was followed, leading to the report and the determination by the Principal in August 2002, that the appellant had not demonstrated satisfactory performance. The process under the *Public Sector Management Act* was then adhered to, and eventually Mr Malik's employment was terminated. Notwithstanding this uncontradicted evidence, time was extended by Commissioner Harrison.
- 38 The respondent appealed to the Full Bench. The Full Bench upheld the respondent's appeal and varied the order granting the extension by deleting the whole of the order and substituting an order that the application for an extension of time be dismissed.
- 39 Without going into detail, the Full Bench considered, *inter alia*, that the evidence adduced by the respondent established positively that the appellant was not unfairly dismissed and that in the absence of any evidence from the respondent, apart from assertions from the bar table which the Full Bench considered should not have been accepted in the face of sworn evidence to the contrary, the appellant failed to demonstrate that the substantive application had any merit. It was for that reason that the Full Bench allowed the appeal.
- 40 The right of appeal to this Court is a restricted one. For present purposes, if the appeal to this Court is to succeed, the appellant must demonstrate within the terms of s 90(1)(b) of the Act that the decision of the Full Bench was "erroneous in law in that there has been an error in the construction or interpretation of [an] Act ... in the course of making the decision appealed against". The appellant submits that there was such an error. The appellant's only ground of appeal is that "the Full Bench erred in law in interpreting section 29(3) of the ... Act ... by holding that the Appellant had a positive obligation to establish the merit of his claim".
- 41 Section 29(3) requires the Commission to decide whether it would be unfair not to accept the referral out of time. Even if it would be unfair not to accept the referral, the Commission retains a discretion to refuse to accept the referral out of time. This is because the subsection states that the Commission "may" accept the reference. As a result, there is not much, if any, difference between this provision and many other provisions which confer a general discretionary power in courts to extend time for the taking of some action to institute proceedings. I agree with what was said by the Federal Australian Industrial Relations Commission in *Clark v Ringwood Private Hospital* (1997) 74 IR 413 about a provision similar to s 29(3):
- "The prima facie position is that the legislative time limit should be complied with and an applicant seeking to pursue an application lodged out of time must persuade the Commission to exercise the discretion ... in their favour.
- The central consideration in determining whether or not an out of time application should be accepted is whether it would be unfair to the applicant not to extend the time limit. We note that such a consideration necessarily involves the exercise of a general discretion."
- 42 Although it is helpful for courts to list considerations which will usually be taken into account in applications to extend time, I agree with comments made by Seaman J in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196 at 204, where he said:
- "... it is impossible to lay down any fixed and binding rule with regard to the cases in which the court will exercise the discretion to enlarge time for appealing, ... each case must be decided upon the particular circumstances surrounding it. ...
- For the reasons which I gave in [an earlier case] ... some consideration of merit is necessary in all but the most unusual case, although the weight which will be attached to it in one set of circumstances may be greatly different from the weight to be attached to it in another."
- 43 In *Clark's* case (*supra*), the Federal Commission set down guidelines that "may assist" in determining whether it would be unfair not to grant an application to extend time. One of the factors in the guidelines was the merit of the substantive application.
- 44 The result is that the correct approach to applications under s 29(3) of the Act is to consider the sole criterion of whether it would be unfair not to grant the extension. Factors which are relevant will vary from case to case. The length of the delay and the reasons for the delay will usually be relevant factors. The merits of the substantive application will usually be a relevant factor, but it is not a *sine qua non*.
- 45 I should pause at this point to refer to what was said by Brennan CJ and McHugh J in *Jackamarra v Krakouer* (*supra*) at [9]:
- "Unless motions to extend time for appeals are to turn into full rehearsals for those appeals, appellate courts can only assess 'the merits' in a fairly rough and ready way."
- 46 Gummow and Hayne JJ said at [34] that it is not useful to fasten upon one verbal formula in preference to all others as a description of the necessary degree of satisfaction the court must reach on the issue of merit.
- 47 In my opinion, those statements are equally applicable to an application for an extension of time under s 29(3) of the Act.

- 48 I now turn to consider the reasons for decision in this case. The reasons must be examined to see whether it is the case, as the appellant contends, that the Full Bench made an error of law in interpreting s 29(3) of the Act by concluding that in every case it must be shown that the substantive application has merit before time may be extended to allow the referral out of time. I refer first to the reasons for decision of Commissioner Kenner, because his reasons were agreed with by Commissioner Scott.
- 49 In directing himself on the law, Commissioner Kenner referred to an earlier decision of his in *Azzalini v Perth Inflight Catering* (2002) 82 WAIG 2992, where he said:
- "... for the purposes of s 29(3) of the Act as it now is, consideration by the Commission of whether it ought extend time for the purposes of this subsection should include the following -
- (a) Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;
  - (b) An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;
  - (c) It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;
  - (d) Considerations relevant to whether it would be unfair to not extend time include -
    - (i) the length of any delay;
    - (ii) the explanation for the delay;
    - (iii) steps taken if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested;
    - (iv) the merits of the substantive application in the sense that there is a sufficiently arguable case; and
  - (e) Whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent, without more, is not a sufficient basis of itself, to grant an application for an extension of time."
- 50 Commissioner Kenner said he would adopt what he said in *Azzalini* for the purposes of the relevant principles to apply in determining the appeal.
- 51 I agree with the quoted passage if, by it, Commissioner Kenner meant in (d):
- "Considerations *usually* relevant to whether it would be unfair to not extend time include ..."
- 52 The argument in this case is that Commissioner Kenner misdirected himself by holding that merit is a *sine qua non* for all applications under s 29(3). The appellant submits that this was an error of law and that it appears from par 113 of Commissioner Kenner's reasons for decision, where he said:
- "Finally, and most importantly however, as to the merits of the substantive application, in my view, on the evidence, it was open for the Commissioner to find, that the respondent's claim lacked any merit at all. This is because not only did the respondent not lead any evidence as to the merits, which he was obliged to do given that he bore the onus of persuading the Commissioner at first instance to extend time, but there was also evidence adduced by the appellant positively against the assertion that the respondent was unfairly dismissed."
- I have underlined the words which are pointed to as suggesting the error of law on Commissioner Kenner's part. The question then is whether the words underlined reveal that Commissioner Kenner had formed the erroneous view that an appellant bore the onus of proving, and could never succeed in gaining an extension of time unless evidence was led to establish, that the application had merit. If that is what Commissioner Kenner was saying, then, in my opinion, there was an error of law in the interpretation of s 29(3) of the Act.
- 53 On the other hand, the paragraph quoted and the words underlined, may mean that because the issue of merit had been raised, and because evidence had been led by the respondent to the effect that the substantive application must fail, the appellant was, as a result, "obliged" in the particular circumstances of this case, to lead some evidence to show that there was an arguable case.
- 54 On balance, I consider that Commissioner Kenner did decide and misdirect himself by concluding that s 29(3) requires, in each and every case, that an arguable case of merit be established by evidence from the employee applicant. This appears from the passage quoted above when read also with the first sentence in par 115 of Commissioner Kenner's reasons, which read:
- "That being so, and in the absence of any evidence from the respondent and the discharge of the onus that rested on him, apart from assertions from the bar table which should not be accepted in the face of sworn evidence to the contrary, in my view, the respondent failed to demonstrate that the application at first instance had merit. Indeed, as I have observed above, the evidence from the appellant, uncontroverted, established to the contrary."
- 55 The President's reasons, in part, reflect the approach which I consider to be correct. He said in par 81(c) that an applicant "will, in many cases, be required to establish that he/she has a case on the merits", and in par 81(k) "it is not possible to list all of the factors which might be relevant". The President correctly stated that in an application under s 29(3), the task of the appellant was to "... establish ... that it would be unfair not to accept" the referral the subject of the application.
- 56 Having decided that the majority erred in law by misdirecting themselves as to the correct interpretation of s 29(3) of the Act, the question then arises as to what order this Court should make. Section 90(3a) of the Act provides that if any ground of appeal is made out but the court is satisfied that no injustice has been suffered by the appellant, the court shall confirm the decision the subject of appeal unless it considers there is good reason not to do so.
- 57 In the circumstances of this case, it would have been understandable if the respondent had not strongly opposed the application for an extension and had not filed any affidavits on the issue of merit. If that had happened, an extension could have been granted. The respondent, however, clearly felt that this was an entirely unmeritorious claim, and so it did raise the issue of lack of merit. In those circumstances, it cannot be said that the Commissioner at first instance and the Full Bench were wrong in concluding that the issue of merit was relevant. The Full Bench's reasoning and conclusion was that it had been established - positively established - on the only evidence before it, that there was nothing unfair about the processes leading to the appellant's dismissal.
- 58 While the Full Bench erred in its conclusion that s 29(3) requires an applicant in every case to show there is merit, there is no reviewable error in relation to its conclusion that the evidence showed that the appellant was not unfairly dismissed.
- 59 There is therefore no point in referring the matter back for reconsideration. If that happened, the direction would be to consider the matter in the light of the decision of this Court. The same result would be bound to follow in view of the Full

Court's positive finding that the substantive application had no merit. The fact that the Full Bench considered that the evidence from the respondent, uncontroverted as it was, established that the application had no merit, and because this was a case where the merit of the application was a relevant consideration, a reconsideration by the Full Bench would only produce the same result, even if the Full Bench noted and applied the correct interpretation of s 29(3) of the Act.

60 I would therefore dismiss the appeal.

61 **EM HEENAN J:** At first instance Commissioner Harrison accepted the applicant's claim for relief for alleged harsh, oppressive or unfair dismissal from his employment with the respondent notwithstanding that the application had been made after the 28 day time limit for the commencement of such an application fixed by subs 29(2) of the *Industrial Relations Act 1979* had expired. The respondent appealed from that decision to the Full Bench of the Commission and, by a unanimous decision (his Honour President Sharkey, and Commissioners P E Scott and S J Kenner) the Full Bench upheld the appeal and dismissed the appellant's application for relief. From that decision the appellant now appeals to this Court under s 90 of the Act which, however, limits the grounds of appeal which may be raised and, in terms relevant to the present appeal, provides:

**"90 Appeal to court from Commission**

- (1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session –
- (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter,
  - (b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
  - (c) on the ground that the appellant has been denied the right to be heard,
- but upon no other ground."

The appellant resorts to subs 90(1)(b) of the Act by alleging, in his single ground of appeal, that the Full Bench erred in law in interpreting s 29(3) of the Act by holding that the appellant had a positive obligation to establish the merit of his claim. This ground is enlarged by particulars which need not be mentioned until later.

62 The background is uncontroversial. The appellant had been employed by the respondent as a school teacher and was assigned to the Corrigin District High School at which he had been employed throughout 2002. Some concerns were entertained by the Principal of the Corrigin District High School about the appellant's capacity to manage his class and to maintain control and a series of investigations or evaluations of his performance were commenced in or about June 2002. After following the departmental process which involved opportunities for the appellant to respond, the appellant was informed, by letter dated 2 January 2003 that his employment was to be terminated as at 7 January 2003. That is what happened and the appellant then gave instructions to "appeal" against the Department's decision to terminate his employment or, in other words, to make an application for relief under s 29 of the Act. There is no suggestion that, after he was notified of the termination of his employment, the appellant did not act promptly in providing instructions to his solicitors to apply to the Commission for relief.

63 Due to oversights within the solicitor's office, apparently due to pressure of work, the application was not filed until 7 February 2003 when it was then three days out of time. The appellant applied for an "extension of time", and made submissions through his counsel to the Commission in support of that application. The respondent, by his counsel, opposed that application and filed affidavit evidence in opposition alleging facts which, if accepted, tended to show that the appellant had no prospects of success in his proposed application.

64 The ultimate decision of the Commission, by the Full Bench, was that the appellant had failed to demonstrate any merit in his proposed application and that, accordingly, time should not be extended. In doing so the Full Bench made observations to the effect that an applicant for an extension of time in such circumstances had a positive obligation to establish "the merit of his claim". This has led the appellant to enlarge upon his ground of appeal by reliance upon the following particulars:

- 1.1 The wording of the section [s 29(3)] should be construed to mean that the referral be accepted if the Commission considers that it would be unfair **to the employee** not to do so (emphasis added).
- 1.2 The concept of 'fairness' imported into the section requires that the test of the merit of the referral be that the referral is 'merely arguable' rather than that the referral is 'likely to succeed' or there is a 'sufficiently arguable case' and there be a balanced consideration of other relevant factors.
- 1.3 The Full Bench failed to give any, or any adequate weight to other relevant factors in support of accepting the referral including the short period of the delay, the cause of the delay attributable to the Appellant's solicitor, the fact the Respondent was aware that the Appellant challenged its decision and there was little or no prejudice to the Respondent."

65 In law, as in life, time is precious. This reflects the relentless fact that time is limited and so must be rationed according to the demands of the circumstances. Time limits abound in statutory provisions and in delegated legislation. Some are final and cannot be extended – they are as pitiless and irrevocable as a departing aircraft or a train leaving a Zurich platform. Some are capable of extension in various circumstances ranging in gravity according to the consequences flowing from late, but unsuccessful, attempts at compliance. In this case we are concerned with s 29(3) of the Act which is of the second category. It provides:

- "29(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

66 As already noted, this application to accept a referral was only three days out of time and it was not alleged that the late acceptance of the application would cause prejudice to the respondent in the only material sense, namely that the respondent would be prejudiced in attempting to make an effectual answer to the claim, because of the delay which had occurred. Nevertheless it was late and the Commission had an obligation to decide, in accordance with s 29(3) whether it should be accepted. For the referral to be accepted it was necessary for the Commission to be satisfied that it would be unfair not to do so. On conventional principles the onus of persuading the Commission that it would be unfair not to accept the late referral must be on the applicant.

67 The terms of s 29(3) provide that the Commission may accept a referral out of time if it considers that it would be unfair not to do so, thus implying that the Commission has a discretion to refuse a late referral even if it would be unfair to do so. It was not argued in this case that provision that the Commission "may accept" means that the Commission must accept a late referral if it would be unfair not to do so and, accordingly, we are not required to address in this case the issue of whether the use of the term "may" in this setting is one of those exceptional occasions where "may" amounts to "must" – see *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51; *Finance Facilities Pty Ltd v Federal Commissioner of*

- Taxation* (1971) 127 CLR 106 at 134 – 135; *Ward v Williams* (1955) 92 CLR 496 at 505 – 506; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 398 and *Tortola Pty Ltd v Saladar Pty Ltd* [1985] WAR 195 at 199 – 200. Nevertheless, it is clear that, before the Commission could accept a late referral, it must be satisfied that it would be unfair not to do so. For reasons which follow that must mean that the consequences for the late applicant of being deprived an opportunity to seek redress from the Commission would, at least for him or her, be unfair having regard to all of the circumstances including the interests of other parties and the public. Submissions were made on behalf of the appellant that the Full Bench was in error in specifying that in every such case the appellant had a positive obligation to establish the merit of his claim and that no such absolute proposition could be sustained. Great care must be taken in utilising any test which does not employ the precise statutory language contained in s 29(3) namely "if the Commission considers that it would be unfair not to do so" because few words are exactly synonymous and each use of a synonym or an analogue may involve a slight shift of meaning all the more distracting because it may be imperceptible.
- 68 In some circumstances it may be unfair to an applicant if, notwithstanding his or her delay, an opportunity to bring an application which has some prospects of success, not merely unrealistic, subjective or fanciful prospects, is denied. In some cases it may be expressly or tacitly acknowledged that the proposed application is one that does enjoy some prospects of success but that there are other factors which would mean that it is not unfair to refuse the late claim. In others, the delay may be short, there may be little or no prejudice to the respondent and the application, if accepted, may have good prospects of success. But for a late claim to be accepted it seems to me that it will in most cases, if not in every case, require some demonstration, whether by acknowledgement, tacit or express, or by the production of evidence, that there is merit in the claim in the sense that it enjoys some prospects of success in the sense already described.
- 69 In my view it is unnecessary here to go as far as deciding whether, as a rule of invariable practice, this must be established in every single instance because, on the present application, the respondent expressly raised the issue that the proposed application had no prospects of success. Once that issue was raised, and evidence was adduced by the respondent to support it, it was incumbent upon the appellant to address it and to attempt, at least, to make out a case that he did enjoy prospects of success in the proposed application. That was not done in any effective manner and the Full Bench decided, in my respectful opinion correctly, that the appellant had failed to show that his intended case had merit and therefore was not entitled to have his late referred claim accepted. The language of the learned members of the Full Bench in addressing this issue on the appeal before them should be read as addressing the issues which had arisen in the particular case where the issue of merit was distinctly raised. They decided that the appellant had not made out a case showing merit in the sense of some prospects of success and that was the issue which had to be determined in the appeal before the Full Bench.
- 70 Before the Commissioner at first instance (who accepted the late referral) and before the Full Bench (which allowed the first appeal and decided that the late referral should not have been accepted) the applicant/appellant explained that the short delay was due to oversight (pressure of work) by his solicitor and that he, himself, had acted as promptly as could be expected. Significantly, however, he did not adduce any formal evidence about the strength or "merit" of his proposed claim. The respondent, by contrast, adduced affidavit evidence to the effect that the applicant had no prospects of success in his proposed application. No answering evidence was adduced by the applicant.
- 71 In the light of the powers of the Commission under subs 26(1)(a) and (b) it was open to the Commission to inform itself on any relevant matter in such a way as it thought just, and this would include taking notice of the grounds of the proposed application which the applicant desired to institute and, to the extent to which the Commission thought acceptable, to accept statements of historical fact or other explanations proffered by the applicant's counsel even though these were not evidence on affidavit. Equally, however, where the Commission was confronted with a conflicting version of the background events, in this case supported by affidavit evidence adduced by the respondent, the Commission was entitled, indeed, required, to determine what version of events it would accept and, it cannot be regarded as surprising or erroneous, that the Commission accepted the respondent's sworn version of events.
- 72 Other areas where courts or tribunals have the power to extend relevant time periods, or to relieve against the consequences of non-compliance or late compliance with time obligations, demonstrate that the time limit should be observed and enforced unless there is some good reason otherwise. As the consequence of enforcing the time limit will usually be to deprive the applicant of the chance to institute, or to pursue, some avenue of desired redress the focus then shifts to the likely consequences of denial of that opportunity.
- 73 In a case like the present, where the applicant belatedly wishes to institute a claim for relief under s 29, there will be no unfairness in rejecting a late application if the application could not succeed. Hence, unfairness must involve, as a minimum at least, the Commission being satisfied that some prospect of success would be denied to the applicant if he could not pursue his late claim. If there is some prospect of success to be lost by denying an extension of time, it would then become necessary to evaluate the position having regard to the length of the delay, its effects upon the respondent and the public interest in the due expedition and finalisation within an acceptable period of legal and industrial processes. Fairness, in this sphere, has a legislative starting point in the choice by Parliament that 28 days is a sufficient period in the public interest for the commencement of such a claim. The longer the delay the more difficult it will be to show unfairness, but even in instances of long delay there may be particular circumstances which reveal that it would be unfair not to accept a late referral. But this point in balancing conflicting interests was never reached in the present case because of the finding by the Full Bench that the application at first instance did not have merit (see his Honour President Sharkey at [91] and Commissioner Kenner at [115]).
- 74 The principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 are apposite. In that case his Honour was considering the jurisdiction under s 170EA of the *Industrial Relations Act 1988* (Cth), as it then was, to grant an extension of time. His Honour said, after examining previous applicable authority:
- "I agree, with respect, that those principles are appropriate to be applied in the circumstances of this matter. Briefly stated the principles are:
1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
  2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
  3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
  4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.

5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

I agree, with respect, with that formulation of the principles and their application in the present case. See also *Clark v Ringwood Private Hospital* (1997) 74 IR 413 (AIRC). However, counsel for the applicant/appellant citing the decision in *Kornicki v Telstra - Network Technology Group* [Print P3168, 22 July 1997] submits that the language of s 29(3) suggests that considerations of fairness towards an applicant are central to the exercise of the discretion and that, at least in the federal sphere, such a test was intended to convey an approach to the exercise of the Commission's discretion more generous to applicants than that which previously prevailed. I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.

- 75 The proposed application by the appellant under s 29 includes an allegation that he was subjected to harassment by students at the school in November 2002 and that this was overlooked by the respondent in reaching his decision to dismiss the applicant. For this reason it is argued that a wrong test was necessarily applied by the Full Bench in concluding that no merit had been established by the applicant for the acceptance of his referral out of time. There are two answers to that submission. The first is that the issue of alleged harassment was apparent to the Commission as it was an express ground of the application which had been filed late and which was before the learned Commissioner at first instance and before the Full Bench. It was in fact addressed by the Full Bench (by his Honour President Sharkey at [43] and by Commissioner Kenner at [114]), but was not regarded by the Full Bench as providing any reason to accept the late application, on the basis that it was not the subject of any acceptable evidence at first instance. Secondly, the decision by the Full Bench is one which was based on all the material before it and, essentially, is a finding of fact that there was no evidence of merit to support the acceptance of a referral out of time. That can only be regarded as a decision by the Full Bench that the sworn affidavit evidence of the respondent should be accepted in preference to the unverified assertions by counsel for the appellant. No attempt has been made to show that that decision is wrong and that is not surprising because it would not have been possible to demonstrate any error in this regard.
- 76 This Court must, therefore, proceed on the basis that there was no acceptable evidence to show prospects of success in this case. There was no error of law nor lack of jurisdiction nor misinterpretation of the Act or any other Act by the Full Bench in reaching this conclusion. It was for the Full Bench to determine what evidence the Commission should act on and this was a decision made in the exercise of that power.
- 77 If there were no prospects of success shown by the appellant for his proposed application for relief under s 29, then there can be no unfairness in declining to accept a referral of a late claim. This case involved a finding that there was "a failure to demonstrate merit" in the particular circumstances [115] per Commissioner Kenner and hence the question of unfairness was correctly and properly addressed.
- 78 This appeal should be dismissed.

2004 WAIRC 11151

AGAINST THE DECISION OF THE FULL BENCH OF THE WAIRC  
IN MATTER FBA 13 OF 2003

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

<b>PARTIES</b>	PREM SINGH MALIK	<b>APPELLANT</b>
	-v-	
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING	<b>RESPONDENT</b>
<b>CORAM</b>	Steytler J (Presiding Judge) Pullin J EM Heenan J	
<b>DATE OF ORDER</b>	WEDNESDAY, 14 APRIL 2004	
<b>FILE NO/S</b>	IAC 13 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11151	

<b>Result</b>	<b>Appeal dismissed.</b>
<b>Representation</b>	
<b>Appellant</b>	Ms K L Fawcett, of Counsel
<b>Respondent</b>	Mr R J Andretich, of Counsel

*Order*

HAVING HEARD Ms K L Fawcett for the Appellant and Mr R J Andretich on behalf of the Respondent, THE COURT ORDERS THAT:

The Appeal be dismissed.

[L.S.]

(Sgd.) J. SPURLING,  
Clerk of Court.

**FULL BENCH—Appeals against decision of Commission—**

2004 WAIRC 10874

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BARMINCO PTY LTD	<b>APPELLANT</b>
	<b>-and-</b> MARCUS JOHN HOLLY	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH	
<b>DELIVERED</b>	FRIDAY, 12 MARCH 2004	
<b>FILE NO/S</b>	FBA 45 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10874	

<b>Decision</b>	Appeal discontinued by consent
<b>Appearances</b>	
<b>Appellant</b>	Ms C Kruger, as agent
<b>Respondent</b>	Mr K Trainer, as agent

*Order*

The parties herein having forwarded a draft minute of consent order to the Commission in the following terms:-

*Whereas* a Notice of Appeal to the Full Bench of the Commission was lodged pursuant to section 49 of the *Industrial Relations Act 1979* on 18 December 2003;

*And whereas* an Application to Stay the order of the Commission (2003 WAIRC 10156) in matter 2067 of 2002 was lodged in the Commission on 19 December 2003;

*And whereas* the Application to Stay the order of the Commission (2003 WAIRC 10156) in matter 2067 of 2002 was heard and dismissed by the President of the Commission on 24 December 2003;

*And whereas* the parties have subsequently entered into negotiations and have settled the matter, in full and final settlement, by agreement in writing on 29 January 2004;

*And whereas* the Applicant has lodged a Notice of Discontinuance of Application FBA 45 of 2003;

*And whereas* the parties have no desire to speak to the minutes of a proposed draft order of the Commission to dismiss the above application;

*The parties therefore consent* to the waiving of their right to be heard on the minutes pursuant to section 35 of the *Industrial Relations Act 1979*;

And the parties herein having forwarded their written agreement to the draft minute of consent order herein, and the Full Bench having determined that the order to discontinue by consent should be made in the terms sought, and the parties herein having waived their rights pursuant to s35 of the *Industrial Relations Act 1979* (as amended), it is this day the 12<sup>th</sup> day of March 2004, ordered and declared as follows:-

- (1) THAT there be leave granted and leave is hereby granted for appeal No. FBA 45 of 2003 to be discontinued by consent.
- (2) THAT the Full Bench refrain and do hereby refrain from hearing the said appeal further.

By the Full Bench  
(Sgd.) P J SHARKEY,  
President.

[L.S.]

2004 WAIRC 10852

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION INC	<b>APPELLANT</b>
	<b>-and-</b> DIRECTOR GENERAL, DEPARTMENT FOR COMMUNITY DEVELOPMENT	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER J F GREGOR COMMISSIONER S WOOD	
<b>DELIVERED</b>	TUESDAY, 9 MARCH 2004	
<b>FILE NO/S</b>	FBA 3 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10852	

<b>Decision</b>	Appeal discontinued by consent
<b>Appearances</b>	
<b>Appellant</b>	Mr J Dasey, Senior Industrial Officer
<b>Respondent</b>	Mr D West, as agent

*Order*

The Notice of Appeal herein having been filed in the Registry of the Commission on the 5<sup>th</sup> day of February 2003, and the parties herein, on the 5<sup>th</sup> day of March 2004, having filed a minute of proposed order to discontinue the appeal herein by consent, and the Full Bench having determined that the order to discontinue the appeal by consent should be made in the terms sought, and the parties herein having waived their rights pursuant to s.35 of the *Industrial Relations Act 1979* (as amended), it is this day, the 9<sup>th</sup> day of March 2004, ordered and declared, by consent, as follows:-

- (1) THAT there be leave granted and leave is hereby granted for appeal No. FBA 3 of 2003 to be discontinued by consent.
- (2) THAT the Full Bench refrain and do hereby refrain from hearing the said appeal further.

By the Full Bench  
(Sgd.) P J SHARKEY,  
President.

[L.S.]

**2004 WAIRC 10828**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION HANSSON PTY LTD	<b>APPELLANT</b>
	<b>-and-</b>	
	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (WESTERN AUSTRALIAN BRANCH)	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH	
<b>DELIVERED</b>	MONDAY, 8 MARCH 2004	
<b>FILE NO/S</b>	FBA 26 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10828	

**Catchwords** Industrial Law (WA) – Appeal to Full Bench from decision of single Commissioner – Union seek to negotiate industrial agreement – Refusal by employer to participate in negotiations – Union apply for declaration that bargaining has ended – Application granted – Declaration issued to that effect – Enterprise order made – Appeal to Full Bench against making of enterprise order – Discussion of Part II, Division 2B of *the Act* – Extension of time s42I(2) application – Conditions precedent to making of an enterprise order – Issues of fresh evidence – Definition of “industrial matter” – Appeal upheld – Procedural fairness - Breach of s26(3) of *the Act* – *Industrial Relations Act 1979* (as amended), s6, s7, s19, s22, s26(3), s27, s32, s41, s41A, s42, s42G, s42H, s42I, s44, s49, s90 – *Workplace Relations Act 1996* (Cth), S170LJ

<b>Decision</b>	Appeal upheld and decision at first instance quashed
<b>Appearances</b>	
<b>Appellant</b>	Mr R Le Miere (Queens Counsel), by leave, and with him Ms K Primrose (of Counsel), by leave
<b>Respondent</b>	Mr H Borenstein (Senior Counsel), by leave, and with him Mr T Dixon (of Counsel), by leave

*Reasons for Decision*

**THE PRESIDENT:**

**INTRODUCTION**

- 1 These are the unanimous reasons for decision of the Full Bench.
- 2 This is an appeal by the above-named employer company against the decision of the Commission, constituted by a single Commissioner, given on Friday, 20 August 2003 in application No 606 of 2003, (and wrongly described in the notice of appeal as having been given on 15 August 2003).
- 3 The appeal is brought pursuant to s49 of *the Industrial Relations Act 1979* (as amended) (hereinafter called “*the Act*”).
- 4 The appeal is brought on a number of grounds which appear at pages 2-6 of the appeal book (hereinafter referred to as “AB”), and the order sought is that the decision of the learned Commissioner be set aside and the applicant’s application be dismissed. We do not reproduce the grounds of appeal in this paragraph.

**DECISION OF THE COMMISSION**

- 5 The order of the Commission appealed against is the decision of the Commissioner made on 20 August 2003. It was an enterprise order made pursuant to s42I(1) of *the Act*.
- 6 We reproduce the terms of that order hereunder (see pages 17-18 (AB)):-
- “WHEREAS on 15<sup>th</sup> August 2003 the Commission issued Reasons for Decision and Minutes of Proposed Order in this matter; and
- WHEREAS on 15<sup>th</sup> August 2003 the parties were advised that they could speak to the Minutes by advising the Commission by the close of business on Tuesday 19<sup>th</sup> August 2003 if they required to speak to the Minutes; and
- WHEREAS the parties were also advised that if they had not contacted the Commission by close of business on Tuesday 19<sup>th</sup> August 2003 it will be assumed that they did not require a speaking to the Minutes and the Order would issue; and
- WHEREAS on 19<sup>th</sup> August 2003 the Applicant Union spoke to the Minutes in writing; and
- WHEREAS by the close of business on 19<sup>th</sup> August 2003 the Respondent had not advised that it wished to speak to the Minutes; and
- WHEREAS the Commission having considered the submissions made in writing by the Applicant Union decided to make minor amendments to the Minutes and to issue final Orders.
- NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979* hereby orders:
- THAT an enterprise order in the form of the schedule attached is made binding to the parties hereto with effect from 16<sup>th</sup> August 2003 until 15<sup>th</sup> August 2004.

**BACKGROUND**

- 7 On 14 May 2003, the Construction, Forestry, Mining and Energy Union (Western Australian Branch) (hereinafter referred to as “the CFMEU”), the above-named respondent, applied to the Commission for an enterprise order pursuant to s42I of *the Act* against the above-named appellant, then the respondent, Hanssen Pty Ltd Project Management (hereinafter referred to as “Hanssen”).
- 8 The CFMEU is an “organisation” of employees registered under *the Act* and therefore, “an organisation” as that term is defined in s7 of *the Act*. Hanssen is a company, and an employer. Hanssen is engaged in the building industry on various building sites in Perth and it would seem, this state. In this particular case the sites were in Terrace Road and Wellington Street, Perth.
- 9 On 19 February 2003, pursuant to s42 of *the Act*, the CFMEU gave notice in writing to Hanssen of its intention to reach an industrial agreement with that company, and sought to negotiate such an agreement to be registered pursuant to s41 of *the Act*, to operate on building and construction projects throughout Western Australia while work is being performed by persons who are members of or who are eligible to be members of the CFMEU.
- 10 As required by s42 of *the Act*, the CFMEU served a draft industrial agreement on Hanssen which contained the conditions sought to be incorporated in the industrial agreement which it wished to achieve as a result of negotiations with Hanssen.
- 11 The CFMEU gave notice that it intended that all the classifications that are described in the *Building Trades (Construction) Award 1987, No R 14 of 1978* (hereinafter referred to as “*the award*”), and all classifications described in the draft agreement be incorporated in any agreement made. The parties to the agreement would then be the CFMEU and Hanssen and any business that consented to be joined as a party to the agreement.
- 12 As is required by s42 of *the Act*, the CFMEU gave 21 days notice to Hanssen requiring the company to advise in writing whether or not it would bargain for an industrial agreement. Twenty one days passed with no response from Hanssen, other than a refusal to participate in negotiations. There was an impasse.
- 13 In accordance with s42H(1) of *the Act*, the CFMEU applied to the Commission for a declaration that bargaining in respect of the claim that had been made on 19 February 2003 had ended. This application was heard by the Commission on 1 April 2003. After considering the submissions of the parties, the Commissioner at first instance, applying conditions precedent which are prescribed in s42H(1) of *the Act*, that is:-
- “If, on the application of a negotiating party, the Commission constituted by a single Commissioner determines that —
- (a) the applicant has bargained in good faith; (as described in s42B(2))
- (b) bargaining between the applicant and another negotiating party has failed; and
- (c) there is no reasonable prospect of the negotiating parties reaching an agreement,
- the Commission may declare that the bargaining has ended between those negotiating parties”
- concluded that there was no reasonable prospect of the parties reaching agreement and declared that the bargaining period between the parties had ended.
- 14 The Commissioner then issued an order to that effect.
- 15 On 14 May 2003, the CFMEU filed the application which was made at first instance. That was an application made pursuant to s42I of *the Act* seeking that the Commission make an “enterprise order” as defined in the section.
- 16 The matter seems to have lain dormant until 15 July 2003 when there was an invitation to Hanssen to hold discussions about the terms of an enterprise order. In the alternative, the CFMEU asked Hanssen to advise in writing if there were any clauses in the draft agreement to which it objected and the basis for such objection. The CFMEU also advised that if there was no response by 18 July 2003, it would be assumed that Hanssen did not object to the terms of the draft agreement as proposed, but rather that it had objected to the principle of signing any agreement to which the CFMEU is a party.
- 17 The application was heard on 28 July 2003. There was no contention that the application was invalid, nor could there have been. If the Commission declares under s42H(1) that bargaining has ended between negotiating parties (see s42I(1)(a)), the Commission may, upon application under s42I(2), make an enterprise order. The Commission may also make an enterprise order if the person to whom a notice to bargain under s42I is given under s42I and there is no response to that notice within the prescribed period, or that person responds with a refusal to bargain (see s42I(1)(b)).
- 18 In the latter case, no s42H declaration is required as a condition precedent to a s42I(2) application.

- 19 At the hearing of the application, Hanssen's managing director, Mr Gerardus Pieter Marie Hanssen (hereinafter called "Mr Hanssen") appeared for Hanssen and, on behalf of the company, opposed the application. Ms Scoble (of Counsel) appeared for the CFMEU and advised the Commission that evidence would be adduced from Mr Michael John Buchan (hereinafter called "Mr Buchan"), an organiser employed by the CFMEU who has responsibility for the two sites, the subject of the application. These sites were in Wellington Street and Terrace Road, Perth, in this State.
- 20 The Commissioner was informed by Ms Scoble, in opening, that there would be no witnesses called who were currently employed by Hanssen because of their fear of victimisation if they spoke out. However, she also informed the Commissioner that the CFMEU would "provide" a survey which it says was conducted amongst workers on the sites. That survey was directed to determining which benefits and working conditions construction workers wanted and currently did not receive when working on Hanssen's sites. It was submitted by Ms Scoble, too, that there was no impediment under the wage fixing principles to the Commission granting any of the conditions claimed in the draft agreement. In opening, Ms Scoble said that there were occupational health and safety problems and disability matters which were required to be considered and about which there would be evidence. It was not part of her opening that the enterprise order sought would impose terms and conditions similar to those in other agreements or to those applying to sites in the city centre of Perth.
- 21 Mr Buchan gave evidence that he was an organiser of the CFMEU in the central business district of Perth and visited various sites where he discussed with employees safety and other union matters. He gave evidence of complaints about safety matters where there was work being conducted by Hanssen at Terrace Road. He also gave evidence about "disabilities" which it would seem were difficult or unsafe conditions on sites (see the list of these at pages 169-172 (AB)). He also gave evidence about the Wellington Street Market Boas-Gardens apartments, another site of Hanssen. Again, his evidence was that there were problems there with health and safety matters.
- 22 Mr Buchan told the Commissioner at first instance that he had conducted a survey of working conditions at the site, that most of the survey forms were returned unsigned because employees were concerned about revealing their "identification", and that Mr Buchan initialled each survey form and dated it when it was distributed, certifying that it was, in fact, filled in by an employee employed on one of the sites. He did not, significantly, say that the survey forms were completed by employees of Hanssen.
- 23 There were 22 survey forms tendered through Mr Buchan (exhibit S6) (see pages 147-168 (AB)).
- 24 These were tendered to the Commission. Copies were given to Mr Hanssen with the names blacked out. Those handed to the Commission did not have the names blacked out. Mr Hanssen did not see those, that is the originals with the names blacked out. Ten people subscribed their names to the forms. No objection was taken to these documents being tendered, by or on behalf of Hanssen. Copies of those documents tendered are headed "Better Working Conditions".
- 25 They also contain lists of working conditions, and people were asked in them to tick boxes if they agreed with the listed condition.
- 26 The survey contains, inter alia, the following notations:-  
"The Construction, Forestry, Mining and Energy Union (CFMEU) is running a case in the WA Industrial Relations Commission to improve the wages and working conditions for construction workers on all Hanssen building sites. Gerry Hanssen claims that the workers on his sites are **NOT** interested in receiving the wages and conditions construction workers get on other city building sites.  
There are many benefits working for an employer who has signed an Enterprise Bargaining Agreement (EBA) Construction workers whose employers have signed an EBA with the CFMEU get the following benefits". (Then there is listed the benefits)."
- 27 Next it is said (see page 38 (AB)):-  
"The underlying question Gerry Hanssen won't answer is, why construction workers on his sites **DO NOT** receive such benefits? The CFMEU wants to hear **YOUR** views on better working conditions."
- 28 Nine forms, which are part of the exhibit S6, bear the full name of the person completing the form.
- 29 There is general approval of the conditions in the forms by those who completed them.
- 30 There was evidence given about a lack of parking, about exposure to the elements on Terrace Road, and of the boggy conditions which increased the disability suffered by the employees. Mr Hanssen appeared and cross-examined Mr Buchan by asking him one or two questions only. He then said that he did not wish to ask any more. Mr Buchan's evidence was not challenged in cross-examination.
- 31 At this time, the Commissioner at first instance asked Mr Hanssen whether, because of the importance of the case, he had considered obtaining legal advice, and the Commissioner gave him an opportunity to think about it and think about whether he wished the matter adjourned for him to obtain legal advice. Mr Hanssen did not take that opportunity. He confined himself to making unsworn statements from the bar table.
- 32 Mr Hanssen made various comments to the Commissioner about the evidence. He was asked by the Commissioner whether he wished to give evidence on oath, whether he intended to call any person to give evidence, or whether he would merely make submissions from the bar table. He declined to give evidence, describing his conduct as defending himself and giving witness. Again, and for the second time, the Commissioner suggested to him that he might wish to obtain legal advice. Further, the implications of his failing to give evidence on oath were explained to him. He still did not take the opportunity to seek an adjournment and obtain legal advice. Mr Hanssen declined to give evidence on oath and passed some comments about the application.
- 33 The statements made from the bar table by Mr Hanssen, at first instance, summarised, were as follows:-
- (a) That there were sub-contractors on the two sites.
  - (b) That signing the agreement, as far as he could see, gave him no relief from industrial action by the CFMEU.
  - (c) That therefore he saw no benefit to Hanssen in making an agreement.
  - (d) He made allegations about being blackmailed on sites, which he did not identify.
  - (e) That he also made a number of statements concerning his philosophy relating to enterprise bargaining agreements and site allowances.
  - (f) That he said that site allowances were not necessary and that the only time when he had granted them they had been ineffective in providing a positive return to his company.

- (g) That various photographs which had been produced by the CFMEU were not truly indicative of the situation on sites. He admitted that two prohibition notices had been served on Hanssen. By that, we assume that he meant prohibition notices issued under the *Occupational Safety and Health Act 1984*.
  - (h) That he declined to give evidence saying that he was defending himself and giving "witness". (That was followed by the Commissioner's second suggestion that he might wish to take legal advice and take an adjournment to do so).
- 34 We wish to make it clear that Mr Hanssen attacked no clause of the agreement as unfair or unreasonable at all. He did say that site allowances were not necessary. He did not assert that the order which was sought would be unfair or unreasonable, and his case indeed was that because of the CFMEU's conduct in its dealings with him, he wished to have nothing to do with the union and certainly did not wish to make any agreement with it.
- 35 Mr Hanssen did not challenge any of Mr Buchan's evidence. It was no part of his case that the terms and conditions were unfair or unreasonable or were not able to be provided for in agreement. He did not assert that his employees should not be subject to or have the benefit of the terms of the proposed agreement (see pages 19-42 (AB)), as such. He did not assert that his employees enjoyed equal, better or worse terms than the terms which were sought by the application in the enterprise order. He did not assert that the terms were inferior to or better than the terms applying generally on building sites in Perth.
- 36 No evidence was adduced by or on behalf of the CFMEU that the terms in the agreement sought were comparable with enterprise bargaining agreements registered in this Commission or certified agreements registered in the Australian Industrial Relations Commission, or with those generally found on building sites in Perth.
- 37 The Commissioner at first instance, having heard only one witness for the CFMEU, namely Mr Buchan, accepted him as a credible witness in the absence of any attack on his evidence by way of cross-examination or otherwise.

### **COMMISSIONER'S FINDINGS**

- 38 The Commissioner then went on to find and decide, summarised, as follows:-
- (a) That the CFMEU requests a set of conditions that are considerably in excess of *the award*. However, they are, he found, conditions similar to those which are contained in dozens of enterprise bargaining agreements registered in this Commission and the Australian Industrial Relations Commission.
  - (b) That, in contemporary industrial law (see paragraph 27 of the reasons for decision at first instance), there is no room for the archaic concept of comparative wage justice, but one would have to say that the terms and conditions set out in the draft agreement are not greatly less or more than might be expected by a contemporary building industry employee working on building works in the central business district of this city.
  - (c) That it may be that some individual provisions of the agreement would never find their way into safety net awards of the Commission, but that that was not the issue to be determined here.
  - (d) That the Commissioner, having found that there had been a refusal to bargain, and having decided that an enterprise agreement should issue, was required to do so if the contents of the order to be made were fair and reasonable.
  - (e) That the conditions claimed were the subject of so many registered Australian Industrial Relations Commission and this Commission's consent agreements that they can be used as a measure to establish whether they are fair or reasonable.
  - (f) S42I of *the Act* is exempted from the operation of the State Wage Fixing Principles.
  - (g) He then expressly decided that for the reasons expressed in paragraph 27, which we have summarised above, that an order should issue.
  - (h) That the Commissioner, having found that there had been a refusal to bargain, and having decided that an enterprise order should issue, was required to do so if the contents of that order were fair and reasonable.

### **ISSUES AND CONCLUSIONS**

#### **The Statutory Framework and the Application**

- 39 Part II Division 2B of *the Act* deals with industrial agreements, bargaining for industrial agreements, registering the same, enterprise orders and various provisions pertaining thereto.
- 40 It is clear that the CFMEU had initiated bargaining for an industrial agreement, an agreement which is defined in s7 of *the Act* as follows:-
- “**“industrial agreement”** means an agreement registered by the Commission under this Act as an industrial agreement;”
- 41 S41(1) in Part II Division 2B of *the Act* provides for the making of industrial agreements in the following terms:-
- “(1) An agreement with respect to any industrial matter or for the prevention or resolution under this Act of disputes, disagreements, or questions relating thereto may be made between an organisation or association of employees and any employer or organisation or association of employers.”
- 42 S41(2) provides for the registration of an industrial agreement by the Commission in the following terms:-
- “(2) Subject to subsection (3) and sections 41A and 49N, where the parties to an agreement referred to in subsection (1) apply to the Commission for registration of the agreement as an industrial agreement the Commission shall register the agreement as an industrial agreement.”
- 43 S41A(1) prescribes other conditions precedent to registration.
- 44 Significantly, s41A(2), inter alia, prohibits the registration of an agreement as an industrial agreement to which an organisation or association of employees is a party, unless the employees who will be bound by the agreement upon registration are members of or eligible to be members of that organisation or association.
- 45 What occurred in this matter was clearly as follows.
- 46 The CFMEU, an “organisation” of employees within the definition of that word in s7 of *the Act*, gave notice to Hanssen as the intended party to an industrial agreement and thereby initiated bargaining for an industrial agreement (see s7). (It is not clear whether that was a written notice, there being, it would seem, no industrial agreement existing or applicable and no enterprise order in force).

- 47 No response was received, except for a refusal to bargain, or, indeed, to enter into any agreement.
- 48 Then, upon application under s42H(1) of *the Act* by the CFMEU, the Commissioner at first instance declared that the bargaining had ended.
- 49 The Commission is empowered, where it declares under s42H that bargaining has ended between negotiating parties (see s42I(1)), and an application under s42I(2) is made to the Commission, to make an order called an enterprise order. The same applies pursuant to s42I(1)(b) which, in our opinion, could have been used in this case. Such an application, subject to the question of time limit, was validly made in this case.
- 50 S42I(1)(c) and (d) of *the Act* prescribes as follows:-
- “the Commission may, upon an application under subsection (2), make an order (an “enterprise order”) —
- (c) providing for any matter that might otherwise be provided for in an industrial agreement to which the negotiating parties referred to in paragraph (a), or the initiating party and the person referred to in paragraph (b), were parties, irrespective of the provisions of any award, order or industrial agreement already in force; and
- (d) that the Commission considers is fair and reasonable in all of the circumstances.”
- 51 S42I(2) provides that an application for an enterprise order may be made where sub-section (1)(a) applies, as it did in this case.
- 52 S42I(3) prescribes that an application for an enterprise order may be made within the period of 21 days after the declaration under s42H was made.
- 53 It is noteworthy, too, that the Commission may exercise its powers of conciliation in relation to a matter, even if an application for an enterprise order has been made in relation to the same matter (see s42I(3)(a) and 42I(4)) (see also the time limit for s42I(3)(b) matters).
- 54 That was how the matter came before the Commission. The application was opposed. The terms of the order sought were “the terms of the enterprise order sought by the CFMEUW are as provided for under the draft Enterprise Agreement that was annexed to the document initiating the bargaining period between the CFMEUW and the respondent”.

### Ground 1

- 55 By this ground, it was asserted that the Commissioner had no jurisdiction or power to make the enterprise order sought because the application for the order was not made within 21 days after the making of the declaration under s42H, as required by s42I(3) of *the Act*. S42I(3) provides as follows:-
- “An application for an enterprise order may be made:-
- (a) Where sub-section (1)(a) applies, within 21 days after the making of the declaration; and
- (b) Where sub-section (1)(b) applies, within 21 days after the end of the prescribed period.”
- 56 The section enables the application to be made within 21 days (see the use of the word “may”, in this case an enabling word, and s56 of the *Interpretation Act* 1984 (as amended)).
- 57 It was accepted that the application was made outside the 21 day period. No objection of any type was taken at first instance that the application was out of time. No application was made at first instance for the extension of the time limit.
- 58 Since the question raised by this ground is one of jurisdiction, then it can be raised at any time (see *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760 (FB)).
- 59 There are, as emerged from the submissions of Mr Le Miere QC for Hanssen and Mr Borenstein SC for the CFMEU, two classes of bar to a right of action or remedies or to an application such as this and the remedy sought by the application.
- 60 The first bar arises because the time limit is an ingredient of the cause of action, and therefore, if the cause of action is not pursued within the time limit, the writ (application) is a mere nullity and the claim must fail. In other words, the period of the time limit having run and the plaintiff (applicant) not having pursued the “cause of action” within the prescribed time limit, the court will not take a step to validate proceedings which are then ab initio defective (see *Maxwell v Murphy* [1956-1957] 96 CLR 261 at 276-277).
- 61 In *The Crown v McNeil and Others* [1922] 31 CLR 76 at 100, Isaacs J referred to both classes of bar but relevantly, too, to this submission, to the second class of bar. The second class of bar is the one which usually arises under statutes of limitations of various kinds.
- 62 As distinct from the first class, statutes of limitations abolish the right of a person who is already in possession of a right or remedy. That is in contradistinction to the first class where a new right vested in the person is extinguished if it is not pursued within the prescribed time limit in any statute. A statute of limitations takes away something which exists already independent of the relevant statute of limitations.
- 63 As Isaacs J said in *The Crown v McNeil and Others* (op cit) at page 100:-
- “In *Hurrinath Chatterji v Mohunt Mothoor Mohun Goswami*, Sir Richard Couch in the Privy Council said:-
- “The intention of the law of limitation is, not to give a right where there is not one, but to impose a bar after a certain period to a suit to enforce an existing right”.”
- He went on to say, however, in relation to the first type of bar (see pages 100-101):-
- “S37 is a condition of the gift in sec. 22, and unless that condition is satisfied, the gift can never take effect. Non-compliance with its terms is not a matter in bar of the claim as in the case of the *Statute of Limitations*: it is an objection which goes to the foundation of the procedure, and shows that the petitioner is not “*rectus in curia*”.”
- 64 The latter part of that dictum describes the approach which Mr Le Miere invited the Full Bench to take. It was contended for Hanssen that the application, because of the terms of *the Act* read with s42I(3) and the right to apply, was therefore conditional for its existence upon the application for an enterprise order being made within 21 days of the event prescribed in s42I(1)(a) or (b).
- 65 Thus, if the application were not made within 21 days, pursuant to s42I(3), then the application was void ab initio.
- 66 For the CFMEU, it was contended that the application was of a kind akin to the second class of bar. That is, that a right and remedy existed independent of the statutory bar which was akin to a statute of limitations barring the enforcement of the remedy or the “cause of action”.

- 67 Thus, there being no plea at first instance that the application was made outside the time limit, such a plea could not now be raised on appeal, so the submission went. Further, according to the submission, the time limit could be extended by the powers of the Commission under s27(1)(n) of *the Act*.
- 68 We turn to determine the nature of the time limit, and therefore the nature of a s42I(3) application.
- 69 These are principal objects of *the Act*:-
- “6. Objects**
- The principal objects of this Act are —
- (a) to promote goodwill in industry and in enterprises within industry;
- (aa) to provide for rights and obligations in relation to good faith bargaining;
- ...
- (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;”
- 70 S6(ad) prescribes that one of the principal objects of *the Act* is to promote collective bargaining and to establish the primacy of collective agreements over individual agreements.
- 71 Next, s6(ae) prescribes as a principal object, the following:-
- “To ensure that all agreements registered under *the Act* provide for fair terms and conditions of employment;”
- 72 Principal object (ag) contained in s6 is:-
- “To encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises;”
- 73 S6(ca) prescribes that it is a principal object to provide a system of fair wages and conditions of employment.
- 74 Part II Division 2B of *the Act* which contains s41 and s42H and s42I, inter alia, fulfils and manifests those objects. There is a mechanism provided by the Division to enable goodwill in industry to be achieved by industrial agreements which are collective agreements brought about by bargaining and indeed, good faith bargaining. They are achievable within enterprises. Such agreements exist, inter alia, to prevent or settle disputes and by agreement to achieve fair and reasonable terms and conditions in enterprises for employers and employees.
- 75 That is borne out further by the fact that an enterprise order must be made only if it is fair and reasonable in the circumstances and provided that it contains the provisions which might be contained in an industrial agreement between organisations, associations and employers, not individual employees.
- 76 The initiative under Part II Division 2B is in the hands of the parties who initiate and continue the process of bargaining in good faith until they reach an agreement. The Commission’s role is only to register and to assist the clear expression of the parties’ intentions in the agreement (see s41(1) and (3) of *the Act*).
- 77 Further, if the process to agreement requires assistance or if it does not succeed, the Commission is empowered to assist in or resolve the process by its powers of conciliation and arbitration under *the Act*. Indeed, the parties may, inter alia, agree to the Commission making orders for some of the terms of the agreement in that event (see s42G).
- 78 However, the Commission cannot require a negotiating party to enter into an agreement or to prescribe its terms save and except to the limit and the extent prescribed by s42G.
- 79 It is only if bargaining does not occur or does not lead to an agreement that the Commission can make an enterprise order under s42I(1) pursuant to an application under s42I(2) made within 21 days under s42I(3). At first instance in this case, there was a s42I(2) application for an enterprise order when bargaining did not occur or failed.
- 80 It is noteworthy that the Commission may use, in any event, its almost unlimited powers to conciliate and arbitrate conferred by s32 and s44, including the power to summon compulsory conferences under s44 (see s32A), at any time, and, in particular, to do so, even if an enterprise order has been made.
- 81 This illustrates the fact that the Commission is a participant in processes under Part II Division 2B in certain circumstances, including the circumstances which obtained here. In making an enterprise order, it is trite to observe, the Commission must act according to equity, good conscience and the substantial merits of the case without regard to technicality or legal forms (see s26(1)(a)).
- 82 Further, a s42I(2) application is not an inter partes matter of the kind referred to in the authorities cited above. An application under s42I(2) is not a cause of action nor does it relate to a cause of action or a suit. It is an act of arbitration dealing with the future rights of the parties akin to the award-making power. The Commission, in making its decision, is required to have regard for the interests of the persons immediately concerned, whether directly affected or not, and, where appropriate, for the interests of the community as a whole (see s26(1)(c)). That illustrates that the proceedings are not inter partes. In addition, there are matters such as the state of the national and state economy and the need to encourage employers and employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises. There are also matters such as the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises are required to be adverted to. (These matters need to be adverted to pursuant to s26(1)(d)(i), (ii), (iii), (vi) and (vii) respectively). There are other matters, too, under that section which the Commission is required to take into account which are not directed necessarily to the interests of the parties to the application before the Commission.
- 83 It will be clear from the outline of the objects of *the Act*, and the manifestation of them in Part II Division 2B of *the Act*, that the Division provides a scheme for the parties to reach agreements, inter alia, in enterprises by collective bargaining, the end result of which bargaining is an agreement which can be registered and which is then enforceable pursuant to *the Act*. The Commission has a role in the process by conciliation and arbitration. Finally, if the bargaining process is not successful, a party who is a negotiating or initiating party in the bargaining process, for such an agreement, may invoke the Commission’s jurisdiction to make an order as it were, in lieu of the agreement, but enforceable as if it were an award. It is noteworthy that an enterprise order enables the Commission, in the proper exercise of its discretion, to stand in the shoes of the parties and make an order providing for any matter that might otherwise be provided for in an industrial agreement, had it been reached by the parties, we would add. Further, the order must be one considered fair and reasonable in all the circumstances by the Commission and the making of which was considered fair and reasonable. What the Commission is doing, however, is confined to the completion of the agreement process which a party or the parties commenced themselves and were unable or

unwilling to complete. Thus, the application for an enterprise order is part of a process where the parties have the carriage of it in order to reach an agreement but where the Commission can intervene by conciliation and/or arbitration at any time to resolve the dispute and the process. In the end, an enterprise order is an order made to resolve a dispute. The ability to apply to the Commission under s42I(2) and (3) is to enable the Commission at the behest of a party to fulfil its major role to resolve disputes as part of the end of the process commencing with an initiative in bargaining to achieve an industrial agreement. The entitlement to make such an application as that under s42I(2) is not the only way in which the matter can come to the Commission. It is an application to resolve a dispute and is a procedural step. It is not the enforcement of a remedy, nor is it the pursuit of a right conferred anew on it apart from *the Act* (see also the power of the Commission to intervene under s32, s32A and s44 of *the Act*).

84 The process is about agreeing, and, in the absence of agreeing, determining rights and obligations arbitrarily and industrially. S42I(2) and (3) are part of that process and one step in it. The matter cannot therefore be characterised as a cause of action which depends on its being pursued within a specific time for its validity. It is a mere procedural prescription in a continuing process commenced under s42 of *the Act*. Therefore, such an application cannot be characterised as or in the manner of a cause of action or suit in the courts, and certainly not one which is void ab initio if not commenced within a prescribed time. Further, s42I(3) does not prescribe a limitation to the invocation of a remedy such as a statute of limitation does. The section is part of a dispute resolution process based on agreements and ultimately resolvable by an enterprise order or by s32 or s44 conciliation and/or arbitration. No new right, in any event, is created other than a procedural right to seek resolution of the process where no agreement has been reached according to statutory prescription. Accordingly, quite clearly, s27(1)(n) of *the Act* can be used because s42I(3)'s prescription of a time limit is a "prescribed time" within the meaning of s27(1)(n) and within the meaning of the word "prescribed" as defined in s5 of the *Interpretation Act* 1984 (as amended). S27(1)(n) reads as follows:-

"(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

...

(n) extend any prescribed time or any time fixed by an order of the Commission;"

85 Assistance can be also derived from *Arpad Security Agency Pty Ltd v FMWU* (1989) 69 WAIG 1287 (FB) and the authorities cited therein.

86 Even if we are wrong in that and this was a limitation statute, in the event that such an application under s42I(2) and (3) could be treated like a suit or cause of action of the type referred to in *The Crown v McNeil and Others* (op cit) and the other authorities above, then the right to extend time by virtue of s27(1)(n) was maintained. We say that because the statute evinces no intention that an application under s42 is void ab initio if not made within 21 days. S42I(3) enables the making of such an application by the use of the word "may" without any further limitation than the period of 21 days for the making of the application. In particular, s42I does not contain the plainly limiting words "may only" which were part of the statute referred to and were plainly prohibitive in *State Electricity Commission of Western Australia Salaried Officers' Association Union of Workers v The State Electricity Commission* (1975) 55 WAIG 747 (IAC). Further, there is no use of words such as "may only be made within 21 days" (see *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] 184 CLR 265).

87 In *Maxwell v Murphy* (op cit) at 266 the prescription was "Every such action shall commence within such a prescribed time".

88 The strong prescriptive language of a mandatory type which appears in those examples illustrates the fact that s42I(3) is not a provision of the same type. The use of the word "may" in s42I without the strict words of prohibition or requirement of the type which we have just quoted, means, in our opinion, and we find, that the time limit in s42I(3) is merely procedural and relates to one procedural step in a prescribed process of dispute resolution by agreement, by order and/or by conciliation and arbitration in the Commission. There was no cause of action created. Therefore, the application was not barred and no "plea" was made or objection taken to the application being made out of time. Thus, there is and was nothing to prevent the Commission being invited to extend the time. It was also contended for Hanssen that the proceedings were null and void because there was no application to extend time. That was met by the submission that that this was a procedural matter of limitation and that therefore the failure to "plead" to the matter out of time raised no defence and the defence of limitation was waived or estopped. We agree that such a defence is now waived or estopped on the authority of *Australian Iron and Steel Ltd v Hoogland* [1961-62] 108 CLR 471 at 489.

89 Next, we agree that *Commonwealth of Australia v Verwayen* [1990] 170 CLR 394 is authority for the proposition that Hanssen not having raised a "defence" that the application was out of time at first instance, is estopped from raising it now, and for the reasons expressed by Their Honours in that case.

90 Further, and cogently, since this defence was not a matter raised at first instance, which if raised might have required evidence to be lead and findings of fact to be made, it cannot now be raised by virtue of s49(4), and, in particular, by the application of the principle in cases like *O'Brien and Others v Komisaroff* [1982] 150 CLR 310 at 318-319 and *Banque Commerciale SA (en liq) v Akhil Holdings Ltd* [1990] 169 CLR 279.

91 Further, Hanssen is bound by the conduct of its case at first instance and should not be permitted to make this submission on appeal (see *Metwally v University of Wollongong* (1985) 60 ALR 68 (HC)). In any event, it was arguable that the matter could and should be entirely remedied by virtue of s27(1)(n) and (m) combined or individually, having regard to s26(1)(a) of *the Act*.

92 For all of those reasons, there was no merit in that ground and it is not made out.

## **Ground 2**

93 By this ground, it was alleged that the Commissioner failed to comply with the prescription of s42I(1)(c) and (d) of *the Act* and thereby failed to exercise its discretion as required by the sub-sections.

94 Mr Le Miere for Hanssen submitted that there were three steps to be taken in the exercise of the discretion as required by s42I. These steps, Mr Le Miere submitted, were as follows:-

The Commission must see whether the conditions under s42I(1)(a) and (b) were satisfied. In this case it was because of the declaration made pursuant to s42H. Next, if that condition is complied with so the submission went, the Commission may, in the exercise of its discretion, upon application under s42I(2) make an order providing for the matter set out in s42I(2)(c).

95 The word "may" confers a discretion to make an enterprise order (see s56 of the *Interpretation Act* 1984 (as amended)).

96 All that is clear, as we find.

97 The third step, so the submission went, is that the Commission may only make an order "that the Commission considers is fair and reasonable in all of the circumstances" (s42I(1)(d)).

- 98 The submission also is that the Commissioner at first instance erred in jumping from step one to step three. The Commissioner (see page 16 (AB)) considered in paragraphs 27 and 28 whether the terms and conditions were fair and reasonable. This the Commissioner did by reference to the conditions claimed to be the subject of so many consent agreements which could be used as a measure to establish that the orders sought were fair and reasonable. What the Commissioner failed to consider was whether he should make an enterprise order at all, so the submission went. Hanssen referred to paragraph 24 of the reasons for decision at first instance where the Commissioner said:-
- “Upon such an application the Commission may make an enterprise order “providing for any matter that might otherwise be provided for in an industrial agreement to which the negotiating parties were parties, irrespective of the provisions of any order or industrial agreement already in force”. Then Commission may then make an enterprise order that it considers is fair and reasonable in all the circumstances.”
- (See paragraphs 27, 28, 29 and 30 generally of the reasons for decision at first instance).
- 99 The Commissioner said at paragraph 30:-
- “I have considered the issues that have been raised in this case. While I am concerned that there has not been a proper ventilation of the principles to be applied, I am required to deal with the matter on the basis that is set out in s42I of *the Act*. In doing so for reasons set out in paragraph 27 and following hereof, I have decided the enterprise order sought by the CFMEU should issue. . .”
- 100 It was submitted for the CFMEU that the Commissioner was cognisant of his obligations under s42I. It was submitted that Hanssen must satisfy the Full Bench that the Commissioner failed to discharge the task which he was given by *the Act*. It was further submitted that there was nothing in the decision of the Commissioner to support the proposition that the Commissioner was not alive to the fact that he had the discretion which he was required to exercise.
- 101 Next, it was also submitted for the CFMEU that it was difficult as a matter of common sense and judicial process to separate the issue of whether one could make an enterprise order because the content of the order one can readily see would be significant and influential in the decision of whether one would make an order at all.
- 102 In this case, it was submitted, when the Commissioner was speaking about the terms and conditions and the factors which he took into account about these, that was reflective of the fact that he was deciding whether he could exercise his discretion to make an order, being an order containing those terms and conditions. Accordingly, it was submitted that he had not failed to exercise the discretion which the section gives to him.
- 103 It is not sufficient to say either, so the submission went, that the Commissioner had failed to advert to a particular step in the process which led to his conclusion in order to establish a failure to exercise the discretion conferred by *the Act*.
- 104 S42I enables the Commissioner to make an order which in effect imposes on the parties the terms of an industrial agreement which they have been unable to reach by agreement between themselves or has not been reached because of the refusal of one party to negotiate.
- 105 Once a s42H declaration was made, as it was in this case, the Commission may by the operation of s42I(1), (2) and (3) make an order providing for any matter that might otherwise be provided for in the agreement.
- 106 It follows then that the s42H declaration is a declaration that bargaining has ended because there are three things that have occurred, namely:-
- (a) The applicant has bargained in good faith;
  - (b) That bargaining between the applicant and another negotiating party has failed; and
  - (c) There is no reasonable prospect of the negotiating parties reaching an agreement.
- 107 S42I(1)(b) does not require a declaration under s42H to issue as a condition precedent to the Commission being empowered to make an application for an enterprise order under s42I(2) within the time prescribed by s42I(3).
- 108 The right to make application and the power to make enterprise orders arises because a person has been given notice under s42(1), and does not reply or refuses to bargain. That occurred in this case. Once that occurs, the Commission is empowered to make an enterprise order subject to and under s42I.
- 109 The terms of such an order are limited. They are limited to providing for any matter that might otherwise be provided for in an industrial agreement to which the initiating, negotiating or other prescribed parties were parties. Also, the Commission can only make provision in the order for matters which the Commissioner considers fair and reasonable in the circumstances. In our opinion, that clearly means that the Commissioner stands in the shoes of the parties and constructs, in lieu of an industrial agreement, orders which are in the same terms as such agreement were it reached and contained fair and reasonable conditions. The role of the Commissioner is therefore to determine also whether there should have been an agreement and what matters the enterprise order, in its place, ought to provide for, asking himself whether it is fair and reasonable to make the order sought, in all of the circumstances, therefore. The Commissioner must make a finding, therefore, that there are matters which might otherwise have been provided for in the agreement between the prescribed parties, and, second, that the Commissioner considers it fair and reasonable to make the order, in all of the circumstances. There are only two steps in the process. This, of course, means that the Commissioner must consider and apply s26(1)(a), s26(1)(c) and, if applicable, s26(1)(d). It is inevitable that one of the circumstances to be considered will almost always be whether the terms sought are fair and reasonable and therefore the two considerations contained in s42I(c) and (d) were, to some extent, overlapped. It is also fair to say that, if the terms of the order sought might have been contained in an agreement between the parties, which has to be found before the Commissioner can proceed, then that sort of finding may often go a long way to determining whether the terms are fair and reasonable and whether even sometimes it is fair and reasonable to make the enterprise order sought.
- 110 The Commissioner decided that the conditions sought were considerably in excess of *the award* but were similar conditions to those contained in the dozens of enterprise bargaining agreements that have been registered in the Commission and the Australian Industrial Relations Commission. Further, the Commissioner went on to find that “the terms and conditions set out in the draft agreement are not greatly less or more than that might be expected by a contemporary building industry employer working on building works in the central business district of this city”.
- 111 Thus, the enterprise order issued because it reflected terms and conditions comparable to enterprise bargaining agreements and federal agreements registered in relation to the building industry in this city. Further, the order was made because the Commissioner found that the terms and conditions were not that much greater or less than what one would expect to find in building sites in this city.
- 112 It is noteworthy that the application was opposed only on the basis that there should be no agreement at all and that that was the way the case was run by Mr Hanssen on behalf of Hanssen at first instance. We have already observed that the actual terms of the order sought were not contested.

- 113 The Commissioner at first instance made no express findings as a result of his acceptance of Mr Buchan's evidence which included the survey documents (exhibit S6). In our opinion, the decision made was one on the merits considering whether the matters provided for were fair and reasonable. The Commissioner decided that they were because they were common conditions in agreements and throughout the industry in this city. There were no other reasons expressed for the finding and for making the order. It is clear that those reasons were the reasons why the Commissioner found that it was fair and reasonable to make the order, in all of the circumstances.
- 114 It is noteworthy and relevant, too, that the application was opposed only on the basis that there should be no agreement at all. The actual terms were not contested. The merits of the making of the order were not contested on any other basis than the enmity between the CFMEU and Hanssen and the CFMEU's alleged unsatisfactory conduct. In our opinion, and we so find, no step was omitted, the Commissioner answered the two questions which he was required to answer, clearly enough, and did so as he was required to do by *the Act*. Whether he took into account all relevant factors or whether the exercise of the discretion miscarried for other reasons, are not matters raised by this ground. However, that ground is not made out for the reasons which we have expressed.

### **Ground 3**

- 115 By this ground, it is asserted that the CFMEU, as applicant at first instance, failed to discharge the burden of establishing that on the merits of the case an enterprise order should be made and the terms of the order were fair and reasonable in the circumstances.
- 116 The ground alleges that this was so because there was no or no sufficient evidence before the Commissioner to the effect that:-
- (a) The employees of Hanssen wanted or supported the application by the CFMEU or the terms and conditions of the order.
  - (b) There was no evidence concerning the terms and conditions of the enterprise order other than those dealing with health and safety matters.
- 117 As Mr Le Miere, who appeared for Hanssen, correctly submitted, the making of an enterprise order is similar to the making of an award. In each case, the order confers rights and imposes duties upon the parties.
- 118 It is not a matter of consent to an agreement in the manner which s41 of *the Act* prescribes, however. It is, as we emphasise, the making of an order which is enforceable in the same manner as an award. It is the resolution of matters between the parties by an order of the Commission.
- 119 It was, however, submitted for Hanssen, by analogy, that the principles applying to the making of awards apply to the making of an enterprise order, and, with that, we agree.
- 120 In particular, so the submission went, the party who applies for an award to issue carries the burden of establishing that it should. Therefore, it was submitted that the party who seeks an enterprise order carries the burden of establishing that that order should be made and in the terms which it is sought the order be made. With that, we also agree.
- 121 Mr Le Miere submitted that the failure to bargain is a matter relating to whether a declaration should be made under s42H, and is not a reason for making an enterprise order. With that, we also agree.
- 122 Next, he took us to the bases of the CFMEU's case, which were, he submitted, that the CFMEU would lead evidence of the desire of workers, including union members working on Hanssen's sites, for improved terms and conditions as they appear in the draft agreement. That was said by Ms Scoble in opening at first instance.
- 123 Next, he submitted, it was asserted at first instance that evidence would be led why no-one on Hanssen's sites had asked for an enterprise bargaining agreement or complained about working conditions, namely fear of reprisals for so doing. It is said in Ms Scoble's opening that there would be evidence about disabilities on sites and poor safety management practices. That evidence was, of course, led, we observe.
- 124 However, Mr Le Miere submitted that evidence about those matters was about only a few limited conditions of the agreement, which is correct.
- 125 The submission in that respect for Hanssen, therefore, was that there was no material before the Commission on which it could exercise its discretion to make the enterprise order. We would also observe that there was no evidence adduced against it. Mr Le Miere submitted that the Commissioner at first instance erred because he did not consider what were the positive reasons why an enterprise order should be made. In particular, it was submitted that there was no or no sufficient evidence that the employees supported the application by the CFMEU on the terms and conditions of the enterprise order.
- 126 It was also submitted, however, for the CFMEU, that there was very much sufficient evidence, on the substantial merits of the case, that the order be made.
- 127 It was submitted for the CFMEU that there is no requirement under *the Act* that the employees be consulted and that should be contrasted with the express different provisions of the *Workplace Relations Act 1996* (Cth).
- 128 Part VIB of the *Workplace Relations Act 1996* (Cth) proceeds on a basis of bargaining which involves the employer and organisations of employees rather than employees themselves, which is similar to s41, so Mr Borenstein, who appeared for the CFMEU, submitted. In this connection, the Full Bench was referred also to s6(ad) of *the Act*. (Interestingly s170LJ(2) of the *Workplace Relations Act 1996* (Cth) requires that an agreement between an organisation of employees and a constitutional corporation must be approved by a majority of the employees. There is no such presumption in *the Act*).
- 129 Therefore, the fact that there was no or no sufficient evidence of support by employees is not a matter of relevance and could not sustain a challenge to the order, it was submitted. We would also add that there was no opposition by Hanssen to the terms of the order sought, with the possible exception of site allowances.
- 130 It was also submitted that there was substantial evidence of disabilities, as well as evidence of rates of pay and failures to manage sites safely. It was also submitted first, that there was evidence (in exhibit S6) of a range of benefits available to employees, and these conditions were prevalent therefore under agreements which the CFMEU had and, second, that these were reflective of the terms and conditions contained in the enterprise order proposed by the CFMEU. That this was the case was not challenged or controverted by Mr Hanssen, so it was submitted.
- 131 It was also submitted that these clauses were not challenged, that Mr Hanssen's case was put only on the basis that he opposed any agreement with the CFMEU, and that he adhered to that position despite it being suggested to him that he seek legal advice and that there be an adjournment so that he could do so.
- 132 There are a number of matters to consider.
- 133 The CFMEU sought to establish, at first instance, that the order should be made in the terms which it contended were the terms in fact of the agreement which it had wished to enter into with Hanssen. These were:-

- (a) That the difficulties described as “disabilities” and safety matters should be resolved in the orders.
  - (b) That the exhibit S6 survey forms were evidence that employees of Hanssen required the order sought and the terms and conditions which were in it.
  - (c) That, in fact, there was no evidence except uncontroverted and unobjected to evidence from the bar table that employees were afraid to deal directly with Hanssen as alleged.
- 134 As was submitted for the CFMEU, the following comments also apply:-
- (a) Hanssen conducted the hearing on the basis that the order was opposed solely because of the enmity between Mr Hanssen and the CFMEU, and, for that reason, Mr Hanssen wanted no agreement and no S42I order. That was the real basis of the opposition to the order. No exception was taken by Mr Hanssen to the order and its terms on the ground of fairness and reasonableness or fairness and reasonableness at all.
  - (b) Hanssen did not conduct the case on the basis that the terms of the order would not benefit the employee. It was not so asserted.
- 135 The Commissioner at first instance noted as we have said, his opinion that Mr Buchan was a credible witness, but expressly limited his reasons for making the order to the reasons which he expressed in paragraph 27 (page 16 (AB)), which reads as follows:-
- “What the CFMEUW requests is a set of conditions which are considerably in excess of the Building Trades (Construction) Award. However they are similar conditions to those which are contained in dozens of enterprise bargaining agreements that have been registered in this Commission and the Australian Industrial Relations Commission. In contemporary industrial law there is no room for the archaic concept of comparative wage justice but one would have to say that the terms and conditions set out in the draft agreement are not greatly less or more than might be expected by a contemporary building industry employer working on building works in the central business district of this city.”
- 136 Those reasons are augmented in paragraphs 28 and 29. However, the reasons essentially are that, because the order sought would apply conditions which are the subject of so many consent agreements that they can be used as a measure to establish that they are fair and reasonable therefore implicitly, they justify a finding, too, that such an order is fair and reasonable in the circumstances.
- 137 There was, of course, a further finding that such agreements reflected with no great variation the sort of conditions which applied to employment on building sites in Perth which was a reason for the decision made, as we have already observed above. Although the Commissioner would have knowledge of conditions in the industry, there was no evidence of actual agreements or conditions in the building industry which might have established that the conditions in the agreement were fair and reasonable and no evidence to justify the order as fair and reasonable. There were only assertions in the survey forms that certain conditions existed, which was not denied
- 138 It is fair to say that, because the Commissioner did not accept the survey evidence as evidence to support those findings, he went to examine agreements registered in the Australian Industrial Relations Commission and this Commission of his own motion. Otherwise, he would have accepted and relied on the survey evidence (exhibit S6). There is, however, significantly, expressly no reliance by the Commissioner on Mr Buchan’s evidence which includes exhibit S6, and it cannot be properly said that that evidence and Mr Buchan’s evidence was any reason for the order being made.
- 139 It should be added that no evidence was adduced at first instance of the content of other registered agreements in the Commission and federally. It is noteworthy, as we have said, that the Commissioner was not disposed to make that order without going to the evidence himself.
- 140 In the circumstances, having regard to the CFMEU’s case and the way it was conducted, it was open to find that the CFMEU had established its case in the way in which it did, on the evidence which it did, which was the matter or information relied on by the Commissioner, but subject to our finding hereinafter about the statutory validity or procedural fairness in the use of that evidence. It was, however, open to find that the unchallenged, uncontradicted evidence justified a finding that an order should be made to reflect the terms relating to matters of safety and disability, which orders were not opposed. That, of course, however, as Mr Le Miere submitted, justified only some small number of the provisions, being the subject of an order.
- 141 There is an argument that the Commissioner might have been required to consider the views of the employees, but their views, in any event, as we will discuss later in these reasons, were not views which opposed the terms and conditions sought to be made the subject of an enterprise order. They merely objected to an enterprise bargaining agreement. In short, by a small margin, there was, subject to what we say hereinafter about the material used by the Commissioner, sufficient to justify the order being made, particularly having regard to the way that Hanssen ran its case.

#### **Ground 4**

- 142 This ground was expressed in the alternative. By this ground it was asserted that the CFMEU had not discharged the burden of establishing that, on the substantial merits of the case, an enterprise order should be made for the reasons advanced by the CFMEU, namely that it was the desire of the employees of Hanssen to have improved conditions in line with the draft agreement. It was submitted that there was no evidence that the employees wished to have such an agreement, and that each of the survey forms was, in fact, not filled out by a relevant employee, and that the survey forms were not accurate and truthful. It was submitted for the CFMEU that these forms were not put forward as an expression of opinion by the direct employees of Mr Hanssen, and that was not the basis on which these matters were put forward. It was submitted that Mr Buchan gave unchallenged evidence, and, on the face of it, plausible evidence about how he went about collecting the survey forms and, nowhere in the transcript was there an assertion by him that he specifically singled out the employees of Mr Hanssen. Indeed, he said, that he knew a number of the employees on the site were not direct employees, that is that they were employees of subcontractors. That is, of course, so.
- 143 The submission was that the survey evidence was led on the basis that it reflected the views of a sample of building workers employed on the Hanssen sites to the extent that the Commissioner might find them relevant to the exercise of his discretion. That was so.
- 144 By this ground, it was alleged that the Commissioner at first instance erred in finding that, on the substantial merits of the case, an enterprise order should be made for the reasons sought by the CFMEU, that is:-
- (a) It was the desire of the employees of Hanssen (“the relevant employees”) working on the relevant sites (“the sites”) to have improved terms and conditions in line with the draft agreement put forward by the CFMEU.
  - (b) The relevant employees, some of whom were identified as union members, were interested in receiving the conditions set out in the draft agreement put forward by the CFMEU.

- (c) The relevant employees of Hanssen were too afraid to deal directly with the CFMEU about improved terms and conditions.
- (d) Each of the 22 survey forms, the survey forms tendered into evidence by Mr Buchan on behalf of the CFMEU ("the survey form evidence"), was, in fact, filled out by the relevant employee employed on one of the two sites referred to above on 21 and 22 July 2003.
- (e) The survey form evidence:-
  - (i) Was accurate and truthful.
  - (ii) Supported the CFMEU's contention that it could form the basis of the CFMEU's request to the Commission to make the enterprise order.

145 It is not at all clear, on Mr Buchan's evidence, or on the forms themselves, that the forms were completed by employees which might explain why the Commissioner did not rely on them or that evidence in making his findings. The fact of the matter is that the Commissioner did not make the orders for any of the reasons expressed in this ground of appeal. He made them for the reasons which he expressed in paragraph 29 of his reasons for decision, which identified particularly the reasons expressed in paragraphs 27 and 28. Thus, that ground is not made out.

146 There are a number of matters to consider. The CFMEU, at first instance, sought to establish that the order should be made in the terms which it contended for, which were the terms, in fact, of the agreement which it had wished to enter into with Hanssen.

147 That matter is covered to a great extent by what we observed in relation to ground 3. The Commissioner did not at all rely on the evidence of persons who, in fact, Mr Buchan did not represent in oral evidence as employees, to justify the order which the Commissioner made. The reasons for which he made the order are clearly set out in paragraphs 27, 28 and 29 of the reasons for decision and we have referred to them in detail above.

#### **Ground 5**

148 This ground calls for the admission of new evidence in the form of affidavits from Mr Hanssen and from his employees obtained and sworn after the proceedings at first instance were completed, and for the purposes of this appeal. There are 27 affidavits in all. There is an affidavit from Mr Gerardus Pieter Marie Hanssen, an affidavit of searches by Ms Wendy Matz, an articulated clerk in the employ of Hanssen's solicitors, and an affidavit by a solicitor, Ms Renae Louise Harding, also in the employ of Hanssen's solicitors. We will deal with Ms Matz's evidence later in these reasons. The rest, 24 affidavits in all, were sworn by employees of Hanssen who say that they never signed any survey and that they do not wish to be subject to an enterprise bargaining agreement. It is noteworthy that no deponent says that they do not want better conditions; nor do they say that their conditions are better than that being offered by the agreement. Further, they do not say that they are being paid at the rate which other agreements provide in the industry. They make no comment on whether the order affords them better conditions. They confine their remarks to whether they want an enterprise bargaining agreement. Further, no deponent disagrees with the terms sought in the order.

149 Many deponents said that they saw the form. All gave evidence that they completed or signed no survey form (exhibit S6).

150 There is some particular evidence to be considered.

151 In relation to whether he wanted an enterprise bargaining agreement, Mr Peter Francis Warren said that he "would go with the flow". One person said that as at 28 August 2003, he would have said "Yes" to an enterprise bargaining agreement. That was Mr Wayne Tumarangi Wiringi. Mr Eoghan Kieran, who signed a survey form, said that he would not support an enterprise bargaining agreement without reading its terms. He was an employee of Hanssen. Ms Harding's evidence was hearsay evidence that an employee of Hanssen, Mr Michiel Adrianus Van Grusven, told her on 26 August 2003 and 28 August 2003 that he did not then and had not supported an application for an enterprise bargaining agreement to govern his conditions of employment.

152 Otherwise, all employee deponents said that they did not on 21 and 22 July 2003, or at the time of swearing or affirming their affidavits, wish an enterprise bargaining agreement to cover their terms and conditions of employment and did not support an application for such to occur. We should add that it was an enterprise order that was made in these circumstances and there was no registration of an enterprise bargaining agreement sought or ordered.

153 Mr Hanssen's evidence is much wider and amongst other things, he gives evidence about why he did not seek to challenge the evidence of the survey (exhibit S6 at the hearing). That, in our opinion, is not admissible evidence on any count. He had every opportunity to object at the hearing and did not, nor did he give any evidence.

154 Mr Hanssen gave evidence in his affidavit, inter alia, that only one of his employees filled in the survey form and that he engaged sub-contractors as well, some of whom had employees.

155 The submission for Hanssen was that the CFMEU's case at first instance was based, in part, on evidence which was false, and, further, that the enterprise order should not have been made because Hanssen's employees did not want it at the time of making the order and did not, at the time they swore these affidavits, desire or support the making of the enterprise order.

156 We were taken to Ms Scoble's opening to which we have referred above. In particular, in the opening there was reference to the submission that there would be evidence adduced of the desire of employees for improved terms and conditions in line with what had been put in the agreement. There was, of course, no such evidence. It was also submitted that evidence would be adduced about why the employees had not asked for an enterprise bargaining agreement or made any complaints about working conditions, namely victimisation of union members and their fearing to speak out.

157 The only evidence adduced in this connection was by the alleged survey documents (exhibit S6). The documents note in a number of cases "name not given because of fear of reprisal".

158 There was then reference in the submission to the documents handed to Mr Hanssen not revealing the name of the person concerned.

159 The evidence sought to be adduced, so it was submitted, is evidence of none of those matters, neither the wish for an enterprise bargaining agreement or fear, it was submitted. Mr Hanssen therefore asserted in his affidavit, that, with one exception, no employee signed the survey. Mr Van Grusven said, according to Ms Harding, that although he had seen the form he had never been handed the form nor had he completed one. He said that he would not then or now support the application for an enterprise bargaining agreement. One employee would have said "Yes" on 28 August 2003. Mr Vic John Stanton said that he would not have minded if asked in July 2003, and did not mind as at 28 August 2003, whether his employment was subject to an EBA. What these documents establish, it was submitted, was that with one exception and two reservations, the employees did not want an enterprise bargaining agreement which would govern their conditions of employment. They did not say that they do not want improved conditions.

160 Next, comes the question of whether the Full Bench has power to admit fresh evidence.

**Is Fresh Evidence Admissible by the Full Bench?**

161 That issue was raised on behalf of the CFMEU, on whose behalf it was submitted that the Full Bench should reconsider the principle laid down by the Full Bench in *FCU v George Moss Ltd* 70 (1990) WAIG 3040 (FB), which has for some years been the law in this Commission.

162 In that case, the Full Bench found that it had power to admit the new or fresh evidence on appeal provided that the evidence met the well known test in *Orr v Holmes and Another* [1948] 76 CLR 632.

163 S49(4)(a) of *the Act* makes it clear that a matter shall be heard and determined on the evidence in matters raised in the proceedings before the Commission.

164 There is no specific provision for the reception of new or fresh evidence. It is correct that an appeal court usually has power to receive fresh evidence.

165 The CFMEU relied on a line of authorities, most recently *Eastman v The Queen* [2000] 203 CLR 1, *Mickelberg v The Queen* [1989] 167 CLR 259 and *Fox v Percy* (2003) 197 ALR 201 (HC), as well as *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194.

166 In *Mickelberg v The Queen* (op cit) Toohey and Gaudron JJ at pages 298-299 held that the power to admit fresh evidence in an appeal from a State Court exercising state judicial power did not exist in the High Court because such power was not conferred by Chapter III of the Constitution of the Commonwealth of Australia. That view was supported as having been long held by the High Court, by Mason CJ at pages 266-267, and Brennan J at page 271 (see also *Eastman v The Queen* (op cit)), and because those authorities are confined to that particular point, they cannot assist the Full Bench in this case. Kirby J said in *Coal and Allied Operations Pty Ltd v AIRC and Others* (op cit) at page 223 that:-

“In every case where the issue is that of the duty and function of an appellate court or tribunal, the only safe starting point is a careful examination of the language and context of the statutory provisions affording the appellate right, together with the consideration of the powers enjoyed by, and duties imposed, on the body to which the appeal lies.”

167 Deane J, although dissenting in *Mickelberg v The Queen* (op cit), said at page 279 (op cit):-

“The traditional common law power to set aside a judgment or verdict on the grounds of fresh evidence has long been accepted as a commonplace component of a general appellate jurisdiction.”

168 We adopt what was said in *FCU v George Moss Ltd* (op cit), that there would have to be a clear prohibition or extinguishment of a common law power on appeal to admit fresh evidence before the Full Bench might come to the conclusion that it does not have that power. That arises from a consideration of the language of the statute. Such an approach also is supported by the principal object s6(c) because, since an appeal process is required, it obviously ought to happen with more expedition and with less technicality and legal form within the Commission, all of whose members are required to act with due speed (s22B) and all of whom are required to keep themselves acquainted with industrial affairs and conditions (s19).

169 S26(1)(a) of *the Act* is best served by an appeal process which enables fresh evidence to be admitted, particularly in the circumstances and role of the Full Bench. This is, of course, particularly so where the Full Bench is what we might call the main court of appeal for the Commission, and appeal rights to the Industrial Appeal Court are limited and do not lie in relation to questions of fact (s90(1)). Further, an appeal, even if made, will not necessarily lead to the decision of the Full Bench being reversed by the Industrial Appeal Court (see s90(3a)).

170 We do not agree with the CFMEU’s submission that the remedies available on appeal, (s49(5)), restrict, on a fair reading of the whole of *the Act*, the Full Bench from admitting fresh evidence by implication. There is certainly no express prohibition on that occurring. The Full Bench has a wide range of remedies which it can order (see s49(5)). In any event, the Full Bench’s role as a final arbiter on appeal is highlighted by s49(6)(a) which requires the Full Bench not to remit a case to the Commission under s49(5)(c) “unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason”. That the Full Bench has that obligation supports the view that it has the power and jurisdiction to admit fresh evidence. We are also mindful of the opinion expressed in *Nguyen and Others v Nguyen* [1989-1990] 169 CLR 245 that a court such as the Full Bench should not lightly reverse itself for the sake of consistency and certainty. In relation to the submission, we would also observe that an intermediate court such as the Full Bench should depart from an earlier decision cautiously and only when compelled to the conclusion that it is wrong. The occasions on which the departures are warranted will be infrequent and exceptionable and cause no real threat to the doctrine of precedent. That is the substance of what was said in *Nguyen and Others v Nguyen* (op cit) to which we have referred. In any event, it is quite clear for the reasons expressed in *FCU v George Moss Ltd* (op cit) and the further reasons expressed by us above, that the Full Bench has the power to admit new or fresh evidence on proper grounds. We would so find.

171 The next question was whether the evidence was admissible. Mr Le Miere submitted that the *Orr v Holmes and Another* (op cit) line of authorities was not applicable to this case. That, of course, like *FCU v George Moss Ltd* (op cit), is a case where all that is involved is that relevant fresh evidence is alleged to have come to the notice of the unsuccessful party after the trial.

172 Mr Le Miere submitted that this case was one which fell within the principle laid down in *Commonwealth Bank of Australia v Quade and Others* [1991] 178 CLR 134. The rule is expressed in that case at pages 142-143, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, as follows:-

“It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of a successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court’s assessment of what would best serve the interest of justice, “either particularly in relation to the parties or generally in relation to the administration of justice” (28). In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party (29), any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available. While it is not necessary that the appellate court be persuaded in such a case that it is “almost certain” or “reasonably clear” that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so.”

173 In this case, it was submitted that if the hearing miscarried for a variety of reasons, as was said in *Commonwealth Bank of Australia v Quade and Others* (op cit), then the *Quade* rule came into effect. In this case, it was submitted, that the hearing

- miscarried because of the deletion of the names from the copies of the survey documents given to Hanssen. It was also submitted that that evidence was false because the survey forms were not completed by Hanssen employees except one, namely, Mr Eoghan Kieran, but were presented to the Commissioner as evidence that they were.
- 174 The case for the CFMEU in opening and closing, it was submitted, was that the employees wanted an enterprise bargaining agreement in the terms and conditions proposed but were too afraid to deal directly with Mr Hanssen or to assert their wishes. Mr Kieran, however, the only employee of Hanssen to fill in the form, did not fit the description of someone too afraid to state his name for fear of reprisals. There was, however, it was submitted, no such evidence as was alleged. It was also submitted that Mr Hanssen was unable to discover that the survey was not, with one exception, survey evidence of the views of any of his employees because the names were blocked out in the copies given to him.
- 175 It was submitted that the factors in *Commonwealth Bank of Australia v Quade and Others* (op cit) were met in this case for the following reasons.
- 176 First, it was submitted for Hanssen, there were general considerations relating to the administration of justice, in that Mr Hanssen was denied evidence tendered to the Commission, and was therefore denied an opportunity to refute or respond to the evidence. Mr Hanssen accepted what was tendered, he said. Second, so the submission went, the situation resulted from culpability on the part of the CFMEU. This is because the CFMEU tendered forms to the Commission as representing the views of employees when they were not the views of Hanssen's employees and the CFMEU took no steps to ascertain whether they were or not. Third, it was submitted that there was no lack of diligence on the part of Hanssen because Mr Hanssen was given no notice of the existence of the survey forms or their proposed use in the hearing.
- 177 Positive evidence of the opinions of employees was lead and that evidence was false and Mr Hanssen was denied a fair hearing so the submission went.
- 178 Finally, it was submitted that there must be a "real possibility" that the result would have been affected.
- 179 In support, it was further submitted that the principal argument put in support of the case for the CFMEU was that the employees wanted and supported the enterprise order and were too afraid to ask for it and come and give evidence for fear of reprisals. It was then submitted that if the evidence now sought to be tendered were before the Commission, that evidence, which was that they did not support the issue of an enterprise order in the terms sought, would have negated the evidence in exhibit S6. Further, that evidence which is sought to be adduced as fresh evidence, would have shown that the employees did not want an enterprise order and that would have been a cogent and compelling reason for the Commission not to make such an order. Thus, so the submission went, the order should be set aside.
- 180 It was then submitted for the CFMEU that the so-called evidence is not new evidence because it was available and capable of being adduced at the hearing at first instance with reasonable diligence. Further, even it was fresh evidence, one cannot make a finding that it would have changed the result.
- 181 It was, however, submitted that Hanssen's employees did not want an enterprise agreement or order. (Mr Hanssen knew or should have known before the hearing). In any event, it was submitted, he could have ascertained from them and they should have been available, if he wanted to contest the terms and conditions of the order. Thus, his failure to adduce that evidence was a forensic error and what he now sought to do was to overcome that error by attempting to redo what he could and should have done at first instance.
- 182 Neither the tendering of the documents (exhibit S6) or the blocking out of the names was objected to, it was submitted. If Hanssen had any concern Mr Hanssen should have voiced it and he did not. However, Mr Hanssen did not because he had decided to follow a particular course in dealing with the application and that course failed.
- 183 The CFMEU further submitted as follows. Mr Hanssen did not need to know the names. He could have sought an adjournment and asked his employees directly whether they were given the forms and whether they filled them out. He did not. Therefore, he did not exercise reasonable diligence with the prosecution of his case.
- 184 He raised no objection, it was submitted. He also was bound by the manner in which he conducted his case. It was also submitted that the survey forms were not tendered as survey forms from the employees or as representing the views of the employees. This case, it is submitted, is different from *Commonwealth Bank of Australia v Quade and Others* (op cit) where documents were not disclosed. Here they were, everything occurred in the open, the documents were able to be perused and no objection was taken. There was no deliberate or unexplained failure to produce documents as there was in *Commonwealth Bank of Australia v Quade and Others* (op cit). This case falls outside the special circumstances raised by *Commonwealth Bank of Australia v Quade and Others* (op cit), it was submitted.
- 185 In any event, there was no disadvantage to Mr Hanssen because he could have called his employees to refute the evidence in the survey whether their names were blacked out or not.
- 186 It was not disputed by the parties that, if fresh evidence were to be admitted, it would have to be admitted pursuant to the principles laid down in *Commonwealth Bank of Australia v Quade and Others* (op cit), to which we have referred above. We agree. First, however, we will find that the evidence sought to be adduced was not new or fresh evidence. It was entirely open to Mr Hanssen, representing Hanssen at first instance, to have first objected and then to have sought an adjournment to adduce the evidence which he now seeks to adduce from his employees, having made the same enquiries of them which were made after the hearing at first instance, in order to draft the affidavits which are now sought to be adduced from his employees and himself.
- 187 It is open to infer that he did not do this because of the basis on which he conducted his opposition to the application at first instance. The evidence was all evidence which should have been adduced and was procurable and adducible at first instance by any diligent effort. In any event, the original evidence, on a fair reading of Mr Buchan and in the form of the survey documents was not what it was said by Ms Scoble in opening to be, as we have found above. The survey forms were not the evidence of employees but of persons who were surveyed on the Hanssen sites.
- 188 The evidence of Mr Hanssen is in same case. In particular, his evidence of why he failed to object is not at all evidence which fits the fresh evidence rule. The fact of the matter is that he did not object at first instance and the reason why he did not object is not relevant. It would not, in our opinion, alter the result.
- 189 Next, *Commonwealth Bank of Australia v Quade and Others* (op cit) is not authority for the proposition that if a hearing miscarries that justifies an application to adduce fresh evidence on appeal. *Commonwealth Bank of Australia v Quade and Others* (op cit) deals with what should occur when misconduct on the part of the successful party has had the result that relevant evidence in his/her/its possession has remained undisclosed until after the verdict. We must observe that relevant evidence was not undisclosed; it was disclosed save and except for the names of the persons surveyed. However, and further, there was an opportunity to consider that evidence, to object to it, to take advice on it and the course and conduct of the application at first instance, to make enquiries and to adduce evidence by way of refutation or otherwise. Two opportunities were offered to Mr Hanssen to do so and he decided not to do so. The crux of the matter is that his case was a different case to

what he now seeks to mount. In any event, apart from names about which enquiries could have been made, and in relation to which the views of his own employees could have been checked, and which could have triggered an objection to exhibit S6 being admitted, all of the evidence was available to and seen by Mr Hanssen in court. The evidence was not undisclosed in that respect until "after the verdict" (see *Commonwealth Bank of Australia v Quade and Others* (op cit) at pages 142-143). In our opinion, therefore, *Commonwealth Bank of Australia v Quade and Others* (op cit) does not apply to this appeal.

- 190 If we are wrong in that, then general considerations of justice do not apply as one of the *Commonwealth Bank of Australia v Quade and Others* (op cit) criteria, because the evidence as such was not in the end represented in the evidence of Mr Buchan to be the evidence of the employees of Hanssen at all. Next, of course, that reduces the degree of culpability of the CFMEU, the successful party, particularly since no objection was taken to the evidence and since Mr Hanssen refused an opportunity to adjourn to seek advice and to investigate and consider the evidence and make enquiries and adduce his own evidence. As to the third matter referred to in *Commonwealth Bank of Australia v Quade and Others* (op cit), those failures by Hanssen represented a serious lack of diligence in dealing with the material in court. Finally, there was no real possibility that the decision would be set aside if that evidence were disclosed and if the new evidence was permitted to be adduced. This was because the Commissioner did not rely on the survey evidence at all; he relied on the evidence of agreements not produced at the hearing and evidence not identified of the fact that the terms and conditions of the enterprise order sought were similar to the terms and conditions of employees on sites in Perth. The same remarks apply to Mr Hanssen's own affidavit for the reasons which we have mentioned above. For all of those reasons, we would not admit any of the affidavit evidence except perhaps Ms Matz's which we will deal with later in these reasons.
- 191 Further, since he did not seek to object to, cross-examine or otherwise seek to challenge the evidence, Hanssen is bound by its case at first instance and should not be allowed to raise this matter now (see s49(4) of the Act and *Metwally v University of Wollongong* (HC) (op cit)). That ground fails for those reasons.

#### **Ground 6**

- 192 By this ground it was asserted that the Commissioner failed to afford procedural fairness to Hanssen at first instance in that it received in evidence the survey forms containing the names of the alleged employees which were deleted. Since, so the submission went, they formed a substantial part of the CFMEU's case, the deletion of the alleged employees' names from the copied exhibits given Mr Hanssen, prevented him from testing, refuting or responding to the evidence.
- 193 It was submitted that in adjudicative proceedings, it will not normally be possible for a party who provides privileged information to the decision maker to resist its disclosure to the other parties (see Aronson and Dyer "*Judicial Review of Administrative Action*" 2<sup>nd</sup> Edition, page 417)).
- 194 In this case, part of the evidence was confidential and not privileged.
- 195 It is not necessary for a person alleging breach of natural justice to prove that material requiring disclosure actually affected the decision, so the submission went. It appears that even an express disavowal by the decision maker of reliance on the material, would not normally overcome the need for disclosure (see Aronson and Dyer "*Judicial Review of Administrative Action*" (op cit)).
- 196 In *Kioa and Others v West and Another* [1985] 159 CLR 550, Brennan J at 629 said:-  
 "It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision, an opportunity to deal with the information."
- 197 This was important relevant information, and on the established grounds, procedural fairness having been denied to Hanssen in that it was not given an opportunity to respond to that evidence, the submission was that the decision must be set aside on that ground. Further, it was submitted, the evidence was not only hearsay evidence, but in being denied the ability to challenge the evidence, Hanssen was denied a fair hearing.
- 198 For the CFMEU, it was submitted that Mr Hanssen, on behalf of Hanssen, had the right to test or object to the survey evidence but did not. It was also submitted as follows. There was nothing which prevented Hanssen from calling its employees at first instance to give evidence. Mr Hanssen could have raised objection to the names which were blacked out but he did not. He did not cross-examine Mr Buchan about the matter. Mr Hanssen, it was submitted, was not interested in those issues. He wanted to tell the Commission that he was angry with the union and wanted no agreement without it. He had not interest in the agreement or its terms. He was there to fight the case on the one ground and he fell or stood by it. Therefore, no question of procedural fairness arose.
- 199 In our opinion, no question of procedural fairness arose because Hanssen had every opportunity to put its case, including challenging the evidence, which was the case which he wanted to put, and he put it. He also had the opportunity to adjourn to take advice about that evidence and object and to make inquiries and object. We wish to emphasise, in any event, that the material, except for the names, and indeed 10 of them were revealed, was not undisclosed and there was every reasonable opportunity afforded to Hanssen to conduct inquiries and investigations and to prepare better with an adjournment. We will not repeat Hanssen's omissions in that respect because we have already referred to them above in detail. One explanation, if explanation were necessary, is that the failure to object to the tender of exhibit S6, to cross-examine about it, to seek advice or take other necessary steps was because Hanssen had made through Mr Hanssen a decision that these were not relevant to the case which Hanssen conducted. Hanssen was simply not denied procedural fairness. Indeed, it was afforded it. Hanssen was afforded the opportunity of an adjournment to take advice. Mr Hanssen was practically advised to take advice. In any event, as we have said before, the actual evidence was not that the survey forms were those of employees, as such. Except for one, they were not. Even if they were, in any event, they form no basis for the decision which was made and the failure to reveal the names would not alter that. It would not, and, in any event, that that was the case was not convincingly contended.
- 200 First, as we have said, there was no denial of procedural fairness for those reasons. Secondly, even if there were, it was not in any substantial way for non-disclosure. In any event, the mere revelation of the name of the surveyees was not likely to change the result, firstly because it was not relevant to Hanssen's case as Mr Hanssen conducted it, and, secondly, because the Commissioner's decision was clearly not made on that evidence. Since the result would not have had changed, the decision at first instance is not flawed even if there were a denial of procedural fairness, which there was not (see *Stead v SGIC* [1986] 161 CLR 141). That ground fails for that reason.

#### **Ground 7**

- 201 This was a ground by which it was alleged that the Commissioner acted in breach of s26(3) of the Act. S26(3) reads as follows:-

"Where the Commission, in deciding any matter before it proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the

matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.”

- 202 The effect of that provision is that there is a mandatory requirement upon the Commission to notify the parties concerned that it proposes or intends to take into account any matter or information not raised before the Commission on the hearing.
- 203 Also, the Commission is then required to then notify the parties concerned of this fact and afford them the opportunity to be heard in relation thereto (that is a mandatory obligation) (see s56 of the *Interpretation Act* 1984 (as amended)).
- 204 If s26(3) of the *Act* is not complied with, then the Commissioner commits an error of law (see *Como Investments Pty Ltd v FLAIEU and Others* (1989) 69 WAIG 1004 at 1005 (IAC) per Brinsden J and see also *Woodberry and Koolan Island Club Inc* (1992) 72 WAIG 1751 at 1754 (FB) and *Robe River Iron Associates v AMWSU and Others* (1990) 70 WAIG 2083 at 2084 (FB)).
- 205 What was alleged was that the Commissioner made a finding and a finding that supported in a major way the finding that an enterprise order would issue. That finding was that the order sought was comparable to dozens of individual agreements registered in this Commission and agreements registered in the Federal Commission and similar to conditions in consent agreements on many sites in the city. These findings were critical to his decision, so the submission went.
- 206 As Hanssen submitted, the reasons for making the order were those which the Commissioner expressed in paragraph 27 (and following), and those were the only reasons which he expressed for making the order. That, as was submitted, was the very basis of the decision. The consent agreements were not referred to or raised by the CFMEU in its own case, so the submission went. The consent agreements and the dozens of agreements registered in this and the Australian Commission are not referred to by anyone, including the Commissioner, at all in the course of the hearing. We have just summarised them above (see also paragraphs 28 and 29).
- 207 Therefore, s26(3) was not complied with and the Commissioner erred and the decision should be set aside, so the submission went.
- 208 For the CFMEU, it was submitted that the matter was before the Commissioner at first instance and therefore that the ground fails. This is because s26(3) only comes into operation if the Commissioner has taken into account something that was not raised in the hearing and in relation to which no opportunity to respond was given.
- 209 In this case, it was submitted that the conditions and the fact that they were the subject of industrial agreements was clearly raised in the survey as was the fact that other employees did not receive the benefit of such conditions. Therefore, on that basis, when the document, exhibit S6, was raised without challenge or objection and it made those assertions, then that matter was sufficiently raised before the Commission and s26(3) was not breached.
- 210 In this case, the only mention of the terms of other industrial and certified agreements was in a broad general way in the survey forms (exhibit S6).
- 211 It was not said that the terms of other similar industrial agreements justified the making of the order, in the course of the proceedings at first instance. No evidence was led to that effect. No such agreements were adduced in evidence. No evidence was adduced of the similarity of terms and conditions of employment which one might find on sites in the Perth area. The Commissioner did not raise these matters as evidence or facts likely to justify the decision which he later made. The Commissioner then went away and inspected or examined or otherwise relied on the terms of dozens of other such agreements and terms and conditions which he said applied to sites in Perth. Their similarity to the order sought was the sole reason for his order. We are satisfied that this issue or matter or evidence was not raised by him or before him. There was general reference to its terms in the survey form but this did not, on any fair reading, purport to raise the arguments on similar terms nor seek the justification on the basis of conditions which prevail elsewhere as a basis for the application to be granted. The parties were not put on notice about this matter or the actual evidence or information ((ie) the dozens of agreements themselves which were taken into account by the Commissioner or the similarity to conditions on sites in Perth). When he proposed or intended to take into account this evidence and/or information, it was for the Commissioner, mandatorily to inform the parties accordingly. He did not. The Commissioner was then required to afford the parties an opportunity to be heard in relation to these matters and particularly the agreements, their content and effect. He did not.
- 212 The Commissioner acted in breach of s26(3) and committed an error of law. The whole of the order then falls and must be quashed (see *Robe River Irons Associates v AMWSU and Others* (op cit) at page 2086 per Brinsden, Roland and Nicholson JJ and see *Re Coldham; Ex parte Municipal Officers' Association of Australia* (1988) 84 ALR 208).
- 213 That ground for all of those reasons is made out.

#### **Ground 8**

- 214 That ground is also expressed in the alternative. Ground 8 is something of a repetition of ground 7 and succeeds for similar reasons. For that reason, too, the decision should be quashed (see *Kioa and Others v West and Another* (op cit)). If any sufficient opportunity had been given to Hanssen to deal with this matter, which it was not, had been granted, then there is a possibility that a different result might have been achieved (see *Stead v SGIC* (op cit)). For that reason, that ground is made out.

#### **Ground 9**

- 215 That is another ground which seeks that new or fresh evidence be adduced, namely evidence in the form of an affidavit sworn by Ms Wendy Matz on 4 September 2003. She was an articulated clerk employed by the solicitors for Hanssen.
- 216 Her evidence was that she inspected six files in the registry of the Commission and then made enquiries about the contents of a further 146 where there were industrial agreements made by consent in the building construction industry, we infer. The upshot was that she was informed by Ms Melissa Rinaldi, Associate to the Chief Commissioner, that clauses 27.5 and 27.6 as they appear in those agreements and in the proposed enterprise order in this case, had been excised. In those cases where they were not excised, then she was informed, they should have been excised and were not excised because of an oversight. They were not, of course, excised in this case. Further, no challenge was made to clause 27.6 in these proceedings. The only challenge was made to clause 27.5 in the proposed enterprise order.
- 217 The point which Hanssen made was that the agreements registered were not the same as the orders sought because those agreements as registered had clauses 27.5 and 27.6 deleted.
- 218 Let us say that we think that that is something of a minor matter and whilst they were not the same, they were almost the same. Indeed, the Commissioner at first instance found that agreements in the industry were the same, but that that the order sought in this case was similar to those agreements. He also found that the terms and conditions in the draft agreement tendered as the basis of the enterprise bargaining agreement contained terms and conditions similar to dozens of bargaining agreements registered in this Commission and in the Australian Industrial Relations Commission. He further added that the

enterprise order sought was not greatly less or more than might be expected by a contemporary building industry employer working on building works in the central business district of this city.

- 219 We do not think that that difference is so great as to constitute an appealable error in these proceedings.
- 220 It was also submitted that this was a case which fell within the principle in *Commonwealth Bank of Australia v Quade and Others* (op cit), which we have already canvassed above in detail. It was submitted that this case miscarried because the Commissioner at first instance made his decision on the basis of evidence not disclosed to Hanssen and which was incorrect. The Commissioner's conclusion or assumption was therefore wrong. Therefore, a new trial should be ordered, first of all because Hanssen was given no opportunity to respond to the proposition that dozens of enterprise agreements were the same or contained conditions the same as those sought in the enterprise order, so the submission went. The Commissioner therefore failed to comply with s26(3) and Hanssen was unable to answer the material relied on by the Commissioner. Next, it was submitted there was no lack of diligence on the part of Hanssen. The matter had not been raised in the hearing so that Hanssen simply did not know about it.
- 221 It was submitted for the CFMEU that this is not a case for the admission of new evidence. The point of the appeal grounds, it was submitted, was not that Hanssen did not know that the Commissioner was going to refer to other agreements, but that those agreements did not contain clause 27.5.
- 222 Clause 27.5 remains in the proposed enterprise order and no attack was made upon it at first instance. It was not hidden or blacked out. The fact is, as the submission went, that Hanssen was not interested in making submissions about the terms of the agreement including clause 27.5 and did not. The matter, it was submitted, should have been raised at first instance and it was not, either deliberately or through lack of diligence and should not be raised now.
- 223 In our opinion, this was a matter, since it was in effect an attack on clause 27.5, which should have been raised at first instance and was not. It cannot be raised now (see *Metwally v University of Wollongong* (HC) (op cit)).
- 224 In addition and alternatively, in any event, *Commonwealth Bank of Australia v Quade and Others* (op cit) does not apply because there was no misconduct on the part of the CFMEU. The real complaint about this ground was that the Commissioner erred in that he relied on a matter or matters or information which he did not notify the parties of and in relation to which he afforded them no opportunity to be heard in accordance with s26(3). The matter arose because the Commissioner relied on material which he did not reveal to them and which he did not give them an opportunity to address on. He did not act in breach of s26(3), except as we have found above that he did.
- 225 We should add that the Commissioner not only relied on "dozens of enterprise bargaining agreements" to decide as he did, but also on unidentified evidence that the terms and conditions of the enterprise order sought were greatly less or more than might have been expected by a construction building industry employer working on building works in the central business district of Perth. That one clause in the order sought is missing from a number of agreements registered in this Commission but that cannot vitiate that finding.
- 226 Grounds 7 and 8 really deal with the subject matter of this ground. However, ground 9 fails for those reasons.

#### **Ground 10**

- 227 The submission for Hanssen is that clause 27.5 of the enterprise order is not an "industrial matter" and hence is outside the jurisdiction of the Commission. Clause 27.5 reads as follows:-
- "The employer must not engage any sub-contractor that has not executed a certified agreement or industrial agreement."
- 228 It seems to have been accepted for the purposes of this appeal that that clause means that the employer, Hanssen, cannot engage any sub-contractor who employs employees with whom he has not entered into a certified agreement under the *Workplace Relations Act* 1986 or an industrial agreement under s41 of the *Act*. It is on that basis that we deal with the clause hereinafter.
- 229 However, the submission for Hanssen was that this was concerned only with the nature of the instrument and not the terms and conditions of employment.
- 230 In our opinion, however, as the CFMEU submitted, the rationale is clear. The union does not want employees' jobs to go to employees who might be employed on conditions less advantageous than those obtaining or negotiated pursuant to industrial agreements or certified agreements under the *Workplace Relations Act* 1986, to which the CFMEU or its federal counterpart are parties.
- 231 The clause is, in our opinion, prospective too in that it forbids the engagement of any sub-contractor and is not retrospective. The clause clearly purports to bind only Hanssen and no other employer.
- 232 By virtue of s42I(1)(c), the Commissioner may only make an order providing for any matter which might otherwise be provided for in an industrial agreement. Therefore, so the submission went, the subject matter of the enterprise order must be a matter which might otherwise be provided for in an industrial agreement. S41 enables an agreement to be made with respect to any industrial matter. However, it enables an agreement to be made "for the prevention or resolution under this Act of disputes, disagreements, or questions relating thereto". In other words, that extends beyond an industrial matter. This matter may well fall within those wider limits of the power to make agreements in this case. If it does, then the clause is actually caught by the statutorily conferred ability to make agreements for the resolution of any questions relating to an industrial dispute or a disagreement. For that reason, the order and clause 27.5 are clearly within jurisdiction. It was submitted that the question was whether or not the order was an agreement with respect to any industrial matter. Except for clause 27.5, it was not contended that the agreement as a whole, which manifested itself as part of the enterprise order, made, was not with respect to any "industrial matter" as defined, upon this appeal. At first instance it was not so contended at all, not even in relation to clause 27.5.
- 233 For convenience, it is necessary to produce the definition of "industrial matter" in s7 of the *Act* in full hereunder and we do so.
- "“**industrial matter**” means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
- (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
  - (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

- (c) ...
- (ca) the relationship between employers and employees;
- (d) ...
- (e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;

...

234 Paragraph (i) of the definition of “industrial matter”, which is a recent edition, reads as follows:-

“Any matter, whether falling within the preceding part of this interpretation or not, where —

- (i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and
- (ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include ...”

235 What King CJ said in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* [1981] 26 SASR 535 at 537-538 (In Banco) in relation to the definition of “industrial matter” in the South Australian Act was this:-

“The Act manifests a clear intention to give the Industrial Commission wide powers to adjudicate upon and to resolve disputes concerning matters which might reasonably be regarded as affecting the employer and employee relationship or which might be the source of disharmony in that relationship.

Clearly there may be causes of disharmony between employers and employee which are totally unrelated to the relationship and which could not be regarded as arising from or relating to industrial matters, but to my mind, the legislature has indicated its will that the Industrial Commission should be a tribunal to which employers and employees can resort to have a decision upon all issues which can legitimately be regarded as industrial issues and which might otherwise result in industrial conflict. If this is the true policy of the Act, as I think it is, it would be quite inconsistent for that policy to place a restrictive interpretation on the naturally wide meaning of the words “affecting or relating to” in the definition.”

236 That is the approach which we would take to the interpretation of the definition of “industrial matter”.

237 It was submitted for Hanssen that clause 27.5 does not relate to the terms and conditions of employment of the sub-contractors employees let alone those of the employees’ employees.

238 Next, it was submitted that a matter of an industrial nature is a matter that has the essential character of an industrial matter and the essential character of industrial matter is that it relates or pertains to the relationship between an employer and employees in that capacity. The submission was that, as a result the definition was not extended. Next, so the submission went, an employers relationship with an independent contractor is not part of the relationship of employer to employee. That, it was submitted, was decided in *R v The Judges of the Commonwealth Industrial Court and Others; Ex parte Cocks and Others* [1968] 121 CLR 313 (see also *R v Moore; Ex parte FMWU* [1978] 140 CLR 470).

239 Thus, whether a provision of an award or agreement relates to the relationship of employer and employee requires a determination as to whether or not the obligations sought to be imposed upon the employer are connected with the relationship between the employer in its capacity as employer and employees in their capacity as employees in a way that is direct and not merely consequential. We were also referred to *CFMEU v Mt Thorley Operations* (1997) 79 FCR 96.

240 In *R v The Judges of the Commonwealth Industrial Court and Others; Ex parte Cocks and Others* (op cit), the court held that a clause which prohibits the engagement of an independent contractor does not pertain to the relationship of employer and employee. In that case, what occurred was that an employee left the clothing factory of the employer and set up independently outside the factory doing dry cleaning of clothes produced by the factory. It was distinguished on that basis in *R v Moore; Ex parte FMWU* (op cit), where the court held that a clause which seeks to provide or limit the terms and conditions of employment of employees of sub-contractors may pertain to the relationship of employer and employee (see also *ALHMWU v AHEIA* (AIRC) (FB) Print M8770, Dec 069/96, 30 January 1996).

241 The clause in this case, it was submitted, was closer to the clause in *R v The Judges of the Commonwealth Industrial Court and Others; Ex parte Cocks and Others* (op cit), in that it was not a complete prohibition on the employer engaging independent contractors but prohibits them from engaging them unless the contractor has entered into a separate certified agreement.

242 There was no evidence to establish any relationship between the letting of contracts and its employees, so the submission went.

243 The submissions for the CFMEU were as follows.

244 This clause should be considered and characterised in the context of the industry in which the agreement is to operate, and that properly understood it seeks to protect terms of employment, though in a non-prescriptive way. This clause does not seek to impose a particular set of conditions of employment on the contractor. It seeks to ensure that there is one of two types of industrial instruments in place and there is no disadvantage in that the terms and conditions are not less favourable than the award. The other form of agreement is of course, an “industrial agreement” as defined in *the Act*. The agreement must be made with a union and therefore it was submitted it is not unreasonable to expect that the conditions that workers will be given under that agreement would be suitably protected because of the involvement of a registered organisation on their behalf.

245 By those two mechanisms, so the submission went, what is sought to be avoided is the situation where an employer might bring people onto the site or might bring contractors with employees onto the site whose terms and conditions fall below the minima which might be prescribed under relevant awards or industry standards. In doing that, it prevents endangering the employment prospects or future employment of Hanssen’s employees or their terms and conditions of employment, so the submission went. In support of the proposition that this was an industrial matter, *R v Moore; Ex parte FMWU* (op cit) was cited, and *R v The Judges of the Commonwealth Industrial Court and Others; Ex parte Cocks and Others* (op cit), was distinguished on the grounds which we have referred to above, and, in our opinion, correctly distinguished. That what the union had sought to do in Cock’s Case was to bring within the regime of the award a person who is an independent contractor operating apart from and outside the factory. The High Court decided in Cock’s Case that there was therefore insufficient connection between the activities of the dry cleaner and the employees in the factory.

246 *R v Moore; Ex parte FMWU* (op cit) was authority for the proposition that there was sufficient interest in the employer companies and the employees at a mine site, in having the conditions of those around whom they worked on the same site, in

- the same workplace, being regulated either by the same award, but, in any event, having sufficient industrial interest to allow the matter to be included in an award for the settlement of an industrial dispute.
- 247 Accordingly, *R v Moore; Ex parte FMWU* (op cit), is authority for the proposition that it is permissible to raise as an industrial matter, the regulation or the terms and conditions of employment of persons who are employed by sub-contractors to the employer because of the interest which the employees of the employer have in the terms of their own employment situation.
- 248 There was also cited *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) per King CJ, Zelling and Mohr JJ. Their Honours held that the Industrial Commission in South Australia had jurisdiction to include in an award made by it provisions prescribing conditions upon which employers bound by the award may engage independent contractors to do work covered by the award.
- 249 King CJ said in *R v Moore; Ex parte FMWU* (op cit) at page 539:-  
 “The significance of the case, to my mind is that all members of the Bench recognised implicitly the connection which may exist between the employer and employee relationship and the terms and conditions upon which an employer or potential employer can have the work done by persons other than his employees.”
- 250 King CJ also said at page 539:-  
 “I am of opinion that an application by a union to have inserted in an award clauses having the effect of requiring that employers or potential employers enter into contracts for the supply of labour of the kind covered by the award only upon terms that they observe in respect of persons supplying the labour rates of pay and other terms and conditions not less favourable to those supplying the labour than those prescribed by the award, is a “matter” which “relates to” an industrial matter. In my opinion, therefore, the Industrial Commission has jurisdiction to hear and determine such a matter.”
- 251 It is necessary also, to observe, that the definition of “industrial matter” in *the Act* was narrower before 2002 than it is now. It is also necessary to observe that jurisdiction is conferred on the Commission to enquire into and deal with an industrial matter not with respect to an industrial dispute or a dispute concerning an industrial matter, save and except under definition (i) of the term “industrial matter” in *the Act*.
- 252 The Commonwealth Acts have to some extent relied on the words in their statute of “industrial dispute”, at least in more recent times. Much of the reasoning decided in some cases, particularly in the federal sphere, but not in the South Australian sphere therefore, do give particular weight to the existence of a dispute. However, under *the Act*, what is necessary to discern is whether there is an “industrial matter” within the terms of the definition of s7 of *the Act*, rather than to be distracted by the questions of whether the parties are in dispute (see *RGC Mineral Sands Ltd and Another v CMETSWU* (2000) 80 WAIG 2437 at 2443 per Parker J (Kennedy P agreeing)).
- 253 We observe that the definition of “industrial matter” in *the Act* is even wider now than it was before the amendments of 2002 (see the *Industrial Relations Reform Act* 2002). We also agree that the definition of “industrial matter” in *the Act* is and has been for some time now wider than the term “industrial dispute” or “industrial matter” referred to in some cases decided by the High Court. However, nonetheless, dicta such as that in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* [1987] 163 CLR 117 at 134 are of great assistance. They are clearly applicable, however, to assist a wide reading of a term such as “industrial matter” in *the Act*. That is a proper approach to its construction which is clearly and correctly stated by King CJ also in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) to which we have referred above and which we apply.
- 254 There are a number of other observations which we wish to make about the interpretation of the term “industrial matter”.
- 255 Their Honours of the High Court in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* (op cit) per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ at page 134, held as follows:-  
 “The words “pertaining to” mean “belonging to” or “within the sphere of” and the expression “the relations of employers and employees” refers to the relation of an employer as employer with an employee as employee; Kelly (78). And, as Dixon CJ noted in *Reg. v Findlay; ex parte Commonwealth Steamship Owners’ Association* (79), although the possibility of an indirect and consequential effect is not enough, the conception of what arises out of or is connected with the relations of employers and employees includes much that is outside the contract of service, its incidents and the work done under it. The Chief Justice went on to say (80):  
 “Conditions affecting the employee as a man who is called upon to work in the industry and who depends on the industry for his livelihood are ordinarily taken into account”.  
 His Honour referred to the remarks of Isaacs and Rich JJ in *Australian Tramways Employees Association v Prahran and Melbourne and Melbourne Tramway Trust* (81), Their Honours, with reference to the equivalent of para (h) at the definition of “industrial matters” in the Commonwealth and State Acts, said:  
 “The ‘conditions’ of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment. And the words “employers” and “employees” are used in *the Act* not with reference to any given contract between any specific individuals, but as indicating two distinct classes of persons co-operating in industry, proceeding harmoniously in time of peace, and contending with each other in time of dispute.  
 Then they referred to the extended definition of “employee” in s4 of *the Conciliation and Arbitration Act* which includes “any person whose usual occupation is that of employee in any industry”, asserting that it makes manifest the last point made in the passage already quoted.”
- 256 That definition is similar to that part of the definition of “employee” in s7 of *the Act*, which reads as follows:-  
 ““**employee**” means —  
 ...  
 (b) any person whose usual status is that of an employee;  
 ...”
- 257 It is to be noted that the words “or pertaining to”, meaning “belonging to” or “within the sphere of”, were added in the definition of *the Act* to the words “affecting or relating to” in 2002. That has the effect of making the definition of “industrial matter” even wider. The words “affecting” or “relating to”, it will be clear from the above authorities, are themselves very wide in their application, in any event. In our opinion, the observation of Dixon CJ as applied in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* (op cit) is of great assistance. It is clear that much which is outside of the contract of service, the incidence and the work done under it can still be an “industrial matter”. Such a view can be applied to the definition of “industrial matter” in *the Act*. It is noteworthy that the definition of “employee” in *the*

*Act* includes a person whose usual status is that of employee, which emphasises that the words “conditions of employment” are not confined to any given contract between specific individuals, but that “conditions of employment” in s7 should be characterised as the phrase was characterised above in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* (op cit). We also adopt the general approach taken by the Full Bench in *Hammersley Iron Pty Ltd v AMWSU* (1990) 70 WAIG 3001 at 3007-3008 (FB).

258 *Automotive Food Metals Engineering Union v Qantas Airways Limited* (unreported) delivered 26 June 2000 (FB) (AIRC) is clear authority for the proposition that a non-employee or employer may be a party to an industrial dispute under the *Workplace Relations Act 1996*.

259 In our opinion, clause 27.5 can be characterised in the same way that King CJ in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) characterised the clauses in that case. The matter in that case was the question whether the South Australian Commission had jurisdiction to include in an award made by it, provisions prescribing conditions upon which the employers bound by the award might engage independent contractors to do work covered by the award. His Honour, King CJ, said at page 538:-

“The three clauses which the union seeks to insert in the award are designed to prevent an employer or potential employer from procuring work, which would otherwise be performed by employees under the award, to be done by sub-contractors for contract prices and under contracted conditions and under contract conditions less favourable to those performing the work than those prescribed by the award. Such an application seems to me to affect or relate to the employer and employee relationship in a close and obvious way. If employers or potential employers can have work which is covered by the award done by sub-contractors at cheaper rates than those prescribed by the award, employees are less likely to be able to obtain and retain employment in the industry. In some cases, employees may be rendered vulnerable to pressure to accept less than award conditions thereby creating problems for the policeing (sic) and enforcement of the award. In other cases, they may be vulnerable to pressure to abandon their status as employees and to accept the work under contract on less favourable terms.”

260 His Honour also referred to *R v Moore; Ex parte FMWU* (op cit).

261 In *R v Moore; Ex parte FMWU* (op cit) case, the High Court held that the draft order put forward by the union in its log of claims which contained a clause to the effect that no employer should permit work covered by the award to be done under contract except in accordance with the terms and conditions of the award was within the jurisdiction of the Australian Industrial Relations Commission. As King CJ said at 539, and we respectfully agree:-

“The significance of the case, to my mind, is that all members of the Bench recognised implicitly the connection which may exist between the employer and employee relationship and the terms and conditions upon which an employer or potential employer can have the work done by persons other than his employees.”

262 We would add that *R v The Judges of the Commonwealth Industrial Court and Others; Ex parte Cocks and Others* (op cit) is distinguishable and inapplicable for the reasons cited in *R v Moore; Ex parte FMWU* (op cit).

263 Clause 27.5 is clearly a case of similar type to the matter in *R v Moore; Ex parte FMWU* (op cit) and in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit). The CFMEU and Hanssen as the employer would be bound by an order which requires sub-contractors with Hanssen to employ no one except by entry into a certified industrial agreement or an industrial agreement under *the Act*. That means that the union or its federal counterpart which represents Hanssen’s employees is seeking and could achieve similar conditions for Hanssen’s employees and other employees on site and thus lessen the risk of undercutting. Thus, the damage or risk to Hanssen employees if such agreement were achieved and/or enterprise orders made would be avoided in relation to the sort of matters canvassed by King CJ in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit), or greatly reduced. The conditions of work or the work of Hanssen employees is directly affected by the employment and the terms of engagement of employees by sub-contractors to Hanssen on the same sites as Hanssen employees work on.

264 There is a close link and relationship to the employment relationship between Hanssen and their employees because of this matter. The clause is very little removed in type from the subject matter of *R v Moore; Ex parte FMWU* (op cit) and *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit), particularly since it relates to “employees”, including persons whose usual status is that of employees, within the definition of employee in s7 of *the Act*. For those reasons, we are satisfied that the matter of clause 27.5 is a matter affecting or relating to or pertaining to ((ie) belonging to) or within the sphere of, the work, privileges, rights or duties of employers or employees in any industry, namely the building construction industry or of any employer or employee therein. In addition, the matter is an “industrial matter” on the reasoning applied by the New South Wales Commission to a similar clause in *Electrical Contractors Association of New South Wales v Electrical Trades Union of Australia, New South Wales Branch and Another* (unreported) delivered 21 December 2003 (1994 of 2003) where that Commission held that a similar clause in an agreement was within jurisdiction because the clauses in that case were clauses which may, like clause 27.5, be properly characterised as having the dominant purpose of establishing a mechanism for the protection of the terms and conditions of the relevant group of employees working under the agreement (see paragraphs 173-175 of that judgement).

265 The definition of “industrial matter” is also extended by the word “includes” (see *R v Holmes and Others; Ex parte Public Service Associate of New South Wales and Another* [1977] 140 CLR 63) to include a number of specific definitions apart from the general definition to which we have referred above and which is not in any way affected in its generality by the specifics which follow. In our opinion, within paragraph (a) of the definition of “industrial matter”, for the same reasons, we are satisfied and so find that the matter of clause 27.5 is a matter affecting or relating or pertaining to the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment. We think that that is apparent from the reasoning adopted by King CJ in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) which we have adopted above.

266 Next, the matter of clause 27.5 is a matter affecting or relating or pertaining to ((ie) belonging to) or in the sphere of, the mode (our emphasis), terms and conditions of employment in definition (b).

267 In particular, as conditions of employment were defined in *Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* (op cit), the matter is an “industrial matter” because it relates to the conditions of employment as defined in that very wide sense.

268 Further, for the reasons which we have expressed above, the matter is an industrial matter because it is a matter affecting or relating or pertaining to the relationship between employers and employees (see paragraph (ca)) which adds to the definition of “industrial matter” the specific definition which we have just referred to.

- 269 We now refer to paragraph (i) of the definition of “industrial matter”, another new paragraph of the definition just as definition (ca) is. In our opinion, this includes a matter of an industrial nature. It was submitted by Mr Le Miere that a matter of an industrial nature can only mean an “industrial matter”. That however, would mean that paragraph (i) of the definition of “industrial matter” has no meaning because a matter affecting an industrial matter, whether there is a dispute about it or not, is by definition within jurisdiction. A matter “of an industrial nature” is one having the qualities of an industrial matter as otherwise defined without necessarily being one (see the *Macquarie Dictionary*, 3<sup>rd</sup> Edition and the definition of “of or in the nature”). Therefore, a matter of an industrial nature which is wide and inclusive except for some special exceptions actually recited relating to organisations and freedom of association, is a matter which relates to matters arising out of or connected with industry as defined in employers or employees without being the direct sort of matter or the restricted sort of matter which an industrial matter otherwise as defined is. The second and major determining indicator is that such a matter must be the subject of an industrial dispute or the subject of a situation that might give rise to an industrial dispute. Therefore, given the objects of *the Act* which are directed to providing the means for settlement of disputes, inter alia, if it is sufficient that a matter has as it were some mark of the industrial about it, giving it a quality of the industrial, that enables it to be brought within the jurisdiction of the Commission where it is the subject of an industrial dispute or where it is the subject of a situation that might give rise to an industrial dispute (see paragraph (i) of the definition).
- 270 Thus, this matter if not within the remainder of the definition of “industrial matter”, which it clearly is, is nonetheless a matter of an industrial nature and it complies with the second prerequisite for jurisdiction in paragraph (i) in that it was and is at first instance the subject of an industrial dispute being resolved by the Commission or the subject of a situation giving rise to an “industrial dispute” at first instance.
- 271 For all of those reasons, we are satisfied that clause 27.5 falls within the definition of “industrial matter”, as we have construed that term above. We are therefore satisfied that it fell within the jurisdiction of the Commission. We are satisfied that for those reasons the grounds are not made out.

#### **Can Industrial Agreements Contain Provisions Not “Industrial Matters”?**

- 272 The authority of *AMEPKIU v Electrolux Home Products* (2002) 118 FCR 177, in the federal context, the existence of a matter not an industrial matter in a federal agreement was not said to be fatal to the registration of a certified agreement federally because the substantial nature of the agreement related to an industrial matter.
- 273 That authority supports the view which we express herein. In our opinion, an agreement under s41 of *the Act* and enterprise order under s42I of *the Act*, which imposes on the parties the provisions of an agreement which could have been made between them, can contain provisions which are not industrial matters. We say that because s41(c) and (d) limit enterprise orders to what might be provided for in an industrial agreement. However, s41 authorises the registration of an industrial agreement as defined in s7 of *the Act* “with respect to any industrial matter”. It does not by those words exclude non-industrial matters, and, in any event, that the agreement goes further than industrial matter and we shall refer to that later.
- 274 It seems to us that, as Their Honours of the Federal Court said in *AMEPKIU v Electrolux Home Products* (op cit), the existence of one or more provisions in an industrial agreement which do not relate to industrial matters does not void the agreement and such provisions are capable of being included.
- 275 It would be clear, of course, however, that an agreement would not be one with respect to an industrial matter if the preponderance of clauses or of significant clauses was such that they rendered the character of the agreement one which did not relate to an industrial matter. This part of the order, of which only one clause is taken exception to, is not such an order and is wholly within power and jurisdiction for the purposes of making the whole of the order sought.
- 276 In any event, s41 whose words govern the sort of order which can be made by way of enterprise order, does not exclude non-industrial matters in an agreement, in any event. An industrial agreement may be registered which does not relate to an industrial matter if it relates to the prevention or resolution of disputes under *the Act*. The same obviously applies to an enterprise order.
- 277 For those reasons, that ground is not made out.

#### **Ground 11**

- 278 We accept the submission for the CFMEU that, because the question of it not being fair and reasonable to make the order made was not raised at first instance, then it should not therefore be raised on appeal. In particular that is so because had it been raised the CFMEU might have been able to call evidence to justify the agreement on different or more comprehensive grounds (see also *Metwally v University of Wollongong* (HC) (op cit)).

#### **Finally**

- 279 The only matter fatal to the Commissioner’s decision was that set out in grounds 7 and 8 of the appeal. The approach of evaluating the application under s42I of *the Act* was not assisted by the failure of the CFMEU to advance an argument as to why the proposed enterprise order should be considered fair and reasonable by the Commissioner, in all of the circumstances.
- 280 The Full Bench has no discretion other than to quash the order. However, the Commissioner is not functus officio so far as the declaration that the bargaining period has ended (see *Robe River Iron Associates v AMWSU and Others* (FB) (op cit) at page 2086). There is still a dispute between the parties and another application may be considered under s42I of *the Act*.
- 281 For all those reasons, we would uphold the appeal. We would quash the order made at first instance and issue a minute of proposed order accordingly.

Order accordingly

## 2003 WAIRC 10115

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	HANSSSEN PTY LTD	<b>APPELLANT</b>
	<b>-and-</b>	
	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (WESTERN AUSTRALIAN BRANCH)	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH	
	HIS HONOUR THE PRESIDENT P J SHARKEY	
	CHIEF COMMISSIONER W S COLEMAN	
	SENIOR COMMISSIONER A R BEECH	
<b>DELIVERED</b>	TUESDAY, 25 NOVEMBER 2003	
<b>FILE NO/S</b>	FBA 26 OF 2003	
<b>CITATION NO.</b>	2003 WAIRC 10115	

<b>Decision</b>	Application dismissed
<b>Appearances</b>	
<b>Appellant</b>	Mr D Sash (of Counsel), by leave
<b>Respondent</b>	Ms K Scoble (of Counsel), by leave

*Order*

This matter having come on for a directions hearing before the Full Bench on the 25<sup>th</sup> day of November 2003, and having heard Ms K Scoble (of Counsel), by leave, on behalf of the respondent and Mr D Sash (of Counsel), by leave, on behalf of the appellant, and the Full Bench having determined that the application by the said respondent should be dismissed, and that reasons for decision will issue at a future date, it is this day, the 25<sup>th</sup> day of November 2003, ordered that the application herein be and is hereby dismissed.

By the Full Bench  
(Sgd.) P J SHARKEY,  
President.

[L.S.]

## 2004 WAIRC 10861

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	HANSSSEN PTY LTD	<b>APPELLANT</b>
	<b>-and-</b>	
	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (WESTERN AUSTRALIAN BRANCH)	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH	
	HIS HONOUR THE PRESIDENT P J SHARKEY	
	CHIEF COMMISSIONER W S COLEMAN	
	SENIOR COMMISSIONER A R BEECH	
<b>DELIVERED</b>	MONDAY, 8 MARCH 2004	
<b>FILE NO/S</b>	FBA 26 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10861	

<b>Decision</b>	Appeal upheld and decision at first instance quashed
<b>Appearances</b>	
<b>Appellant</b>	Mr R Le Miere (Queens Counsel), by leave, and with him Ms K Primrose (of Counsel), by leave
<b>Respondent</b>	Mr H Borenstein (Senior Counsel), by leave, and with him Mr T Dixon (of Counsel), by leave

*Order*

This matter having come on for hearing before the Full Bench on the 9<sup>th</sup> and 10<sup>th</sup> days of December 2003, and having heard Mr R Le Miere (Queens Counsel), by leave, and with him Ms K Primrose (of Counsel), by leave, on behalf of the appellant, and Mr H Borenstein (Senior Counsel), by leave, and Mr T Dixon (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 8<sup>th</sup> day of March 2004, and the parties herein having waived their rights pursuant to s.35 of the *Industrial Relations Act 1979* (as amended), it is this day, the 8<sup>th</sup> day of March 2004, ordered and declared as follows:-

- (1) THAT appeal No FBA 26 of 2003 be and is hereby upheld.

- (2) THAT the decision of the Commission in application No 606 of 2003 made on the 20<sup>th</sup> day of August 2003 be and is hereby quashed.

[L.S.]

By the Full Bench  
(Sgd.) P J SHARKEY,  
President.

**2004 WAIRC 10924**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	HANS THEODOOR MACHIELSE	<b>APPELLANT</b>
	<b>-and-</b>	
	NU-WEST DEVELOPMENT PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER P E SCOTT COMMISSIONER J H SMITH	
<b>DELIVERED</b>	FRIDAY, 19 MARCH 2004	
<b>FILE NO/S</b>	FBA 38 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10924	

<b>Catchwords</b>	Industrial Law (WA) – application pursuant to s29(1)(b)(i) dismissed – Appeal to the Full Bench – Appeal against findings of fact made at first instance – Demonstrated failure by appellant to fulfil requirements of the employer – No error in findings at first instance – No error in the exercise of discretion at first instance – Appeal dismissed – <i>Industrial Relations Act 1979</i> (as amended), s29(1)(b)(i).
<b>Decision</b>	Appeal dismissed
<b>Appearances</b>	
<b>Appellant</b>	Mr H T Machielse, on his own behalf
<b>Respondent</b>	Ms Bilston, as agent, and with her Mr E Rea, as agent

*Reasons for Decision*

**THE PRESIDENT:****INTRODUCTION**

- 1 This is an appeal by the above-named appellant, Hans Theodoor Machielse, (hereinafter called “Mr Machielse”) against the decision given by the Commission at first instance, constituted by a single Commissioner, on 10 October 2003 in application No 1728 of 2002. The appeal would appear to be against the whole of the decision. The appeal is brought pursuant to s49 of the *Industrial Relations Act 1979* (as amended) (hereinafter called “*the Act*”).
- 2 The decision appealed against is an order that an application made by Mr Machielse at first instance pursuant to s29(1)(b)(i) of *the Act* be dismissed (see page 37 of the appeal book (hereinafter referred to as “AB”).
- 3 The appeal is made on a number of grounds related to findings of fact by the Commissioner at first instance which are set out in a great deal of detail in the grounds of appeal (see pages 2-10 (AB)), and to which I will refer hereinafter.

**BACKGROUND**

- 4 Mr Machielse alleged that he was dismissed unfairly by the above-named respondent, Nu-West Development Pty Ltd (hereinafter called “Nu-West”) on 18 September 2002. (See page 2 (AB)). He made application to the Commission pursuant to s29(1)(b)(i) and (ii) of *the Act*, by application filed on 15 October 2002. The claim under s29(1)(b)(ii) was abandoned at first instance. He sought reinstatement, or, in the alternative, compensation.
- 5 He claimed that he had not been employed since he was dismissed.
- 6 It was not in issue that Mr Machielse was employed by Nu-West in the position of construction co-ordinator on terms which appear in the written contract, a letter, dated 18 June 2002 signed by Mr Machielse and on behalf of Nu-West (exhibit A3, pages 38-39 (AB)). The salary payable was \$45,000.00 per annum, and there was provided to him a motor vehicle and a mobile telephone. He was expressly required, by the written contract, to report to the general manager – construction, Mr Gary James Francis, the brother of Mr Robert Norman Francis, who was the managing director of Nu-West, and, at all material times, chairman of the Nu-West Development Group. That letter, formal parts omitted, reads as follows:-

“We refer to our meetings and are pleased to offer you the position of Construction Co-ordinator with our company, Nu-West Developments Pty Ltd on the following terms of employment:

Commencement:	Monday 1 July 2002.
Salary Package:	The salary package is inclusive of a salary component of \$45,000-00 per annum together with the provision of a motor vehicle and a mobile telephone.
Superannuation:	Superannuation at the applicable SGC rate (currently 8.00%) will be paid on the salary component of your package.
Annual Leave:	Four weeks annual leave will apply

- Working Hours: This position is a salaried position and some work will be required to be undertaken outside normal office hours.
- Salary reviews: An initial salary review will be undertaken prior to 1 October 2002 and subject to satisfactory performance, your base salary will be increased to \$52,000-00 per annum with effect from 1 October 2002. Future salary reviews will be undertaken as at 30 June each year.
- Bonuses: The company intends to introduce a bonus system commencing the 2002/2003 financial year and we confirm that your position will participate in the bonus scheme.

We advise that the position of Construction Co-ordinator reports to the General Manager Construction, Mr Gary Francis, and we request that you report to Mr Francis our office at 9-00am Monday 1 July 2002.

We request that you please sign the attached duplicate of this letter of offer and return it to our office to confirm your acceptance of the offer of employment with our company.

We thank you for your interest in our company and look forward to your working with us.”

- 7 Mr Machielse came back to Australia and to Perth after a nine year absence from the country, in May 2002. He left his family in South America, in fact Guyana, where they had been living, and came here for the purpose of re-settling, finding himself a good job, a steady job, and accommodation so that he could then make an application to enable him to sponsor his wife and two sons to migrate to Australia. It was therefore absolutely imperative that, from the start, he would get a good job, he said.
- 8 Mr Machielse was introduced to Mr Robert Francis by a friend. There was an interview, and Mr Robert Francis mentioned that he was a developer and had big plans to develop blocks of land on which he proposed to build low cost housing. He said that the turnover of the business was one million dollars in the last two or three years, and would increase, according to Mr Machielse. Mr Machielse advised Mr Robert Francis that he needed a long term job to make an application to the Department of Immigration. They discussed salary. Mr Machielse sought accommodation for himself using a reference from Mr Gary Francis.
- 9 I have already referred to the letter of engagement and terms of employment above.
- 10 Mr Machielse commenced his employment on 1 July 2002. There had been, in the course of the interview, an indication by Mr Machielse that he had not used a computer for nine years, but he was told to take the first week to familiarise himself with it and with a program called Microsoft Project which Nu-West used, particularly for project schedules and purchase orders and for a number of other things. Indeed, it was said in evidence to be essential to the operation of the business. I paraphrase.
- 11 There were matters which arose between the parties during the course of the employment which included the following:-
- (a) Mr Machielse’s inability or failure to familiarise himself with and use Microsoft Project.
  - (b) His failure to produce project reports or schedules electronically.
  - (c) His failure to comply with the quote procuring procedures of Nu-West.
  - (d) His alleged personality difficulties which including dominating discussions and “overlording”.
  - (e) The failure by Mr Machielse to follow proper purchase order procedures and particularly to have purchase orders counter-signed by Mr Gary Francis.
  - (f) Mr Machielse’s alleged going over the head of Mr Gary Francis to Mr Robert Francis when Mr Gary Francis was the person under whose direction he worked.
  - (g) Various other complaints.
- 12 It is fair to say that Mr Machielse denied that these matters were problems, save and except for the computer programme, the Microsoft Project, where, he, in short, said that he had not been properly trained and was not given an opportunity to be properly trained.
- 13 I will deal with the question of the merit of those allegations later in these reasons but suffice to say those problems were alleged to exist by the respondent.
- 14 Mr Robert Norman Francis, because of the failure to produce the electronically schedules or project reports, although some reports were manual reports, purported to dismiss Mr Machielse on 2 September 2002. Mr Machielse in evidence was equivocal about whether this was a dismissal or not. In any event, at the request of Mr Machielse he was restored to his work and given one last chance by Mr Robert Francis, a fact which was not denied. This one last chance, however, was, and it was not denied, on the basis that he produced the electronically produced reports and/or project schedules required. In the end, he did not and he was dismissed on 18 September 2002, after a meeting to discuss the matter involving Mr Robert Francis, Mr Gary Francis and Mr Paul McCafferty, Nu-West’s company secretary.
- 15 That is a brief background to the matter and I will deal with the evidence in more details later in these reasons.

#### EVIDENCE

- 16 The evidence before the Commissioner in this matter at first instance was from Mr Machielse, who was the only witness for himself, Mr Robert Norman Francis, Mr Gary James Francis, and the person who was described as a personal assistant, Ms Noeline Whiteford, who was an employee of Nu-West. There was also a quantity of documentary evidence.

#### FINDINGS AT FIRST INSTANCE

- 17 The Commissioner at first instance made, summarised, the following findings:-
- (a) That he had no confidence in the evidence of Mr Machielse and unreservedly preferred the evidence given on behalf of the respondent, because Mr Machielse’s evidence was inconsistent and unreliable at best.
  - (b) That he considered the evidence of Mr Robert Francis, Mr Gary Francis and Ms Noeline Whiteford to be direct, honest and temperate.
  - (c) That Mr Robert Francis complained that Mr Machielse would seek to dominate conversations with the loudness of his voice and would seek to “overlord” others and was argumentative. The Commissioner found that these characteristics were witnessed at hearing.

- (d) That Mr Machielse's evidence was frequently inconsistent. He said that he got on well with the Francis brothers and liked working with them, but described Mr Robert Francis as a bully. Subsequent to the dismissal, he sent a number of emails to them which the Commissioner found were less than cordial or friendly.
- (e) That Mr Machielse was requested to familiarise himself with the computer in the first week and received assistance and they were available to help him but he did not ask.
- (f) That the computer and Mr Machielse's inability to produce computer generated project schedules was a key element of the evidence and the reason for Mr Machielse's termination. It was not in doubt that Mr Machielse did not produce these computer generated schedules, but chose instead to do manual schedules. Mr Robert Francis was not happy about this because they lacked detail and could not easily be adjusted to reflect changes to the project.
- (g) That Mr Machielse did not seek to perform properly in relation to the computer and did not follow instructions. He also had all the support needed and resources available to be able to learn the required programs.
- (h) That in relation to purchase orders 3208, 3208a and M22, which were tendered on behalf of Nu-West, Mr Machielse was responsible for these orders, they were not completed properly, and in at least one instance amounted to issuing a blank cheque on behalf of the company.
- (i) That Mr Machielse did not perform his duty in relation the quotation system properly, and did not follow instructions. He claimed that he was seeking to save money for the respondent.
- (j) That he found that Mr Machielse did not perform his duties properly, did not follow instructions, and was thus not suited to the job.
- (k) That Mr Machielse did not get purchase orders countersigned.
- (l) That he had been dismissed on 2 September 2002 for failing to produce a computer schedule for a house to demonstrate that he could and would perform his job. It was only after extensive discussions with Mr Francis and agreeing to do the job that he was asked to do that he was given back his job. That he then failed to "deliver" and was finally dismissed some two weeks later after failing to produce the schedule as asked on two occasions in the weekly team meetings and failing to give any legitimate reason for so doing.

#### **ISSUES AND CONCLUSIONS**

- 18 The decision appealed against is a discretionary decision as that term is defined in *Norbis v Norbis* [1986] 161 CLR 513 (see also *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194).
- 19 It is therefore for the appellant to establish on the principles laid down in *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC), and in myriad other reasons for decision of Full Benches of this Commission, that the exercise of the discretion miscarried at first instance.
- 20 It is also well settled that matters such as this are determined by the well known principles laid down in *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC).
- 21 In *Fox v Percy* (2003) 197 ALR 201 (HC) and *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 and a number of cases followed on many occasions by Full Benches of this Commission, findings of fact based on credibility have been paid due deference and are required as a matter of principle to be given due deference.
- 22 Further, this was a case where the Commissioner's findings depended on the credibility of witnesses observed by the Commissioner in the witness box, although there was a quantity of documentary evidence.
- 23 The principle to be applied by the Full Bench, as it has been so often applied, is the principle laid down in *Devries and Another v Australian National Railways Commission and Another* (op cit). That principle can be expressed as follows:-  
 "A finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellant court thinks that the probabilities of a case are against - even strongly against - that finding. If the finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the judge has failed to use or has palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable".
- 24 The judgement was applied in *Fox v Percy* (HC) (op cit) at pages 217-224 (per curiam). In the report of that case the following dictum appears at page 223:-  
 "It is a serious mistake to think that anything said in *Abalos* or *Devries* necessarily prevents an appellate court from reversing a trial judge's finding when it is based, expressly or inferentially, on demeanour. Those cases recognise - in accordance with a long line of authority - that it may be done. But there must be something that points decisively and not merely persuasively to error on the part of the trial judge in acting on his or her impressions of the witness or witnesses. Recently, in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (in liq), for example, this court held that undisputed and documentary evidence was so convincing that no reliance on the demeanour of witnesses could rebut it."

#### **Submissions on Appeal**

- 25 There were a number of submissions on appeal, which I now summarise.
- 26 Mr Machielse submitted that, because he was offered the job and did not ask for it, there is a greater onus on an employer to do the right thing by the employee, particularly if the employee is fresh and new in the country or comes from another position.
- 27 In relation to the instruction on how to use the computer, Mr Machielse submitted that he was given a very thick manual in relation to the Microsoft program, told that he would get a new computer in the new office and that the manual comprised the program which the company uses. He submitted that he was unable to work on the computer during the first week of his employment because they were moving premises. It was submitted, too, on behalf of Nu-West, that that was not the evidence before the Commissioner.
- 28 Mr Machielse submitted that the manual of instruction given to him comprised the program which the company uses. He submitted that he had made it clear to Mr Robert Francis that he needed a steady job and accommodation so that he could sponsor his wife and two children as immigrants to this country. It was, he submitted, therefore unfair that after he submitted the actual sponsorship application to the immigration office, having asked Mr Gary Francis for permission to do so on 22 August 2002, he was dismissed. He also submitted that during the first week he was unable to acquaint himself with the computer and the programs because the office was in disarray, the computers were disconnected or being disconnected.

- 29 The Commissioner at first instance also did not permit him to refer to his diary, he complained.
- 30 Mr Machielse was promised training and tutorials in the computers but this never occurred, he submitted. Mr Machielse also submitted that his position was that of a co-ordinator of the company because Mr Gary Francis became general manager, having been co-ordinator. Mr Machielse submitted that his evidence was that he was familiar with the sort of work which Mr Gary Francis introduced him to. Thus, he was not hired only to do purchasing orders and quoting and "other minor or junior jobs".
- 31 Mr Robert Francis, he submitted, admitted (see page 197 of the transcript at first instance (hereinafter referred to as "TFI")) that Mr Machielse took over the co-ordinating job, and was "managed to do all the purchase orders all right". Mr Machielse submitted that he had done no purchase orders until the last two weeks of his employment and had not had anything to do with them before (ie) not until after 2 September 2002). There were discussions when he was first employed about pay, he submitted, because he wanted more than Mr Robert Francis was prepared to pay, so that there was discussion, too, about his living in one of their houses and an arrangement being made about rent (see page 211 (TFI)).
- 32 He submitted that the evidence of Mr Gary Francis was that Mr Machielse was doing all kinds of jobs. Mr Machielse submitted that he was flat out helping Mr Alan Thompson, the construction manager, with all of the defects and delays which Mr Thompson was experiencing on the existing jobs. Mr Machielse submitted that the evidence was that when Mr Thompson went on leave he had to attend to the defect list left by Mr Thompson with Mr Gary Francis. (That, however, if it occurred, was only in the last week of his employment).
- 33 Again, Mr Machielse submitted that he had little to do with purchase orders and making programs.
- 34 Mr Gary Francis, he said, made a gift to him of a colour television which he did not want and he submitted that the import of that was that Mr Gary Francis would not have done it if he was not happy with his performance. Mr Machielse also submitted that the evidence was that he bought a computer to help with his own training.
- 35 Ms Noeline Whiteford gave evidence that Mr Machielse was very pleasant to everybody and was very personable, Mr Machielse submitted.
- 36 Mr Robert Francis said in evidence, Mr Machielse submitted, that his experience was too great and he really needed a junior. He submitted that Mr Robert Francis said that Mr Machielse was hired three to five months too early. Mr Robert Francis said that he was about to build 60 new houses and that is why he needed a person like Mr Machielse.
- 37 Mr Machielse submitted that the remuneration which he received did not denote a junior position because the remuneration, including the provision of a four wheel drive car and the payment of mobile phone rental and fees, was worth about \$68,000.00 to \$70,000.00.
- 38 Mr Machielse submitted that he had written letters at Mr Robert Francis' request saying why he should remain employed by Nu-West (see pages 46-48 (AB)) following Mr Robert Francis' purported dismissal of him on 2 September 2002.
- 39 Mr Machielse submitted too, that he appointed two contractors and maintained that he had the power to appoint them. He said that he discussed this with the general manager - construction, Mr Gary Francis. He also denied that he was required to refer some matters to Mr Gary Francis. He said that he had a certain degree of authority within the company (see page 45 (AB)). Attending to Mr Thompson's list of defects constituted one week's work, and this was what Mr Gary Francis also admitted, he submitted. It was also during the week that Mr Thompson was on leave that Mr Machielse had to learn about putting purchase orders on the computers. These related to limited and small orders for Mr Thompson's jobs, not for thousands of dollars worth, Mr Machielse said.
- 40 For Nu-West, it was submitted that Mr Machielse was employed for a period of approximately two and a half months. It was submitted that there was not evidence which might properly lead to a finding of unfair dismissal. It was submitted that the "outline" of the terms of employment, on the evidence, included a probationary period, his duties, experience, training and performance and the discipline process and termination itself.
- 41 It was submitted that the evidence of Mr Robert Francis, Mr Gary Francis and Ms Noeline Whiteford were that he was given a manual and one week to learn it (see page 222 (TFI) - Mr Gary Francis).
- 42 There was also evidence, on behalf of Nu-West, that there were other staff available to tutor Mr Machielse using the program that he was also given and further that the copy of the program was loaded onto his home computer by Mr Gary Francis, so the submission went. There was also evidence that there was computer assistance and a tutorial diskette available to him (see page 224 (TFI) - Ms Whiteford's evidence). Ms Whiteford said that it was not a difficult program to learn. Mr Gary Francis gave evidence that Mr Machielse had the fundamental computer skills required to have a sound basis from which he could reasonably have learnt the Microsoft computer program (see page 178 (TFI)). It was therefore submitted that that being the evidence, and that Mr Machielse gave no evidence to the contrary, that he was able to work on the computer in the first week of his employment. Indeed, he was directed by Mr Gary Francis, so it was submitted on the evidence, to work on the computer during the first week of his employment. Mr Machielse also did not question the credibility of witnesses, nor were submissions made by him to refute the credibility of Nu-West's witnesses' evidence, it was submitted. It was also submitted that Mr Robert Francis' comment that Mr Machielse's experience was possibly a lot more than the type of person they were looking for was taken out of context. It was also submitted for Nu-West that because Mr Machielse had many years experience in the building industry, he should have been able to complete the basic requirements of his position. There was nothing that would render Mr Robert Francis' evidence untrue on the submissions or on the other evidence which was given, so the submission went. The submission was also that he was dismissed in part due to the fact that he did not complete the basic requirements of his position. Therefore, whether he took over the role of Mr Gary Francis or not was not relevant to the determination of whether the dismissal was, in fact, harsh, oppressive or unfair. Mr Gary Francis gave evidence that Mr Machielse was able to complete the purchase orders. He also gave evidence (see page 197 (TFI)) to the effect that Mr Machielse had sufficient background and computer knowledge to lead to the belief that the position could adequately have been filled by Mr Machielse. In the submissions we were taken to that evidence.
- 43 Mr Machielse was also unable to explain, it was submitted, why the purchase orders tendered (see page 50 (AB)) had been incorrectly completed by him. There was also evidence by Mr Gary Francis (see pages 179-187 (TFI)) and Mr Robert Francis that the errors in the purchase orders were unacceptable. The question of a claim for rental by Mr Machielse was not pursued, and it was submitted that Mr Machielse had admitted in evidence "this was a cheeky act on my part".
- 44 Ms Whiteford said in evidence that Mr Machielse seemed to get on well with most of the staff on a one to one basis. However, it was submitted, she said that she had heard Mr Machielse raise his voice (see page 225 (TFI)) a few times to Mr Robert Francis or Mr Gary Francis. She said that she would not do that because it is not the thing to do.
- 45 It was submitted that Mr Machielse seemed to be attempting to introduce new evidence and this comment was made in submissions about a great deal of his submissions from the bar table. It was also submitted that Nu-West did not sack Mr Machielse on the spot for not compiling the reports. He was dismissed because over a period of time he failed to carry out

a number of the requirements of his position and because he was involved in a number of performance related concerns which ultimately lead to his dismissal.

- 46 The duties which were elicited from Mr Machielse as his (see page 33 (TFI)), included responsibility for scheduling contractors, their jobs, drawing up their schedules, quote comparisons and providing purchase orders for authorisation by Mr Gary Francis. These were said by him to be part only of his duties. His contract of employment did not include a four wheel drive vehicle, or rent, or the provision of fuel, or payment for mobile phone calls, it was submitted on the evidence.
- 47 It was further submitted that grounds 8 and 9 do not adequately deal with the errors which the Commissioner at first instance was submitted to have made in law.
- 48 The agreement to employ prescribes that there would be an increase in payment upon satisfactory performance after a three months period, but does not prescribe probation for three months.
- 49 It was submitted that reference to the cash flow sheet of Nu-West was not relevant. It was therefore submitted that no error was established and that the appeal should be dismissed.

#### **Findings Open on the Evidence**

- 50 What is quite clear, in this case, is that Mr Machielse was engaged as construction co-ordinator to work under the direction of the general manager – construction, of Nu-West, Mr Gary Francis. It is also clear that he was provided with a car, a mobile telephone, and that his remuneration was agreed to be \$45,000.00 per annum.
- 51 There was a dispute at first instance about whether his contract of employment was subject to a probationary period of three months or not. He said that it was not. Such a provision did not appear in the letter of engagement. Mr Robert Francis said that he made it clear to Mr Machielse in the initial interview, that he would be required to serve a three month period of probationary employment, but that it was excluded from the written document at Mr Machielse's request because Mr Machielse wished to be able, in order to have his wife and children migrate to Australia, to be able to show the Immigration Department that he had a permanent job.
- 52 Mr Gary Francis also gave evidence that every employee, including him, had been subject to a three month probation period when first engaged by Nu-West.
- 53 It was not in dispute that Mr Machielse was dismissed on 18 September 2002 on one week's pay in lieu of notice, having been employed to that time by Nu-West for about two and a half months. He commenced employment on 1 July 2002.
- 54 It was also clear that he was dismissed because Nu-West alleged that he was unable to perform his work satisfactorily for a number of reasons. In particular, and most importantly, it was alleged that he was unable or unwilling to produce, electronically, project schedules or reports showing the progress of the building of houses on various single and multiple sites. It was not in issue that Mr Machielse had a great deal of experience in the building construction industry. This, however, was the housing construction industry. Nu-West was engaged in building low cost housing on multiple and single sites in the Perth metropolitan area.
- 55 It was not in issue that Mr Machielse told Mr Robert Francis and Mr Gary Francis that he had had no experience with computers for nine years.
- 56 It was also not in dispute that when he was engaged, Mr Machielse was told by Mr Gary Francis to familiarise himself with the computer program which was used by Nu-West and which was called Microsoft Project. It was particularly used for vital functions such as composing the schedules for building on sites and updating and altering those schedules, and for generating purchase orders for the supply of materials and services after quotes had been obtained. It was open to so find, and should have been found.
- 57 The evidence of the Francis brothers was that the computer program was essential for the proper running of the business and that manually produced schedules and purchase orders (with the exception of a very limited category of manually produced orders), were not compatible with or able to be included in the program. That evidence, as I have just mentioned it, was not contradicted or challenged by Mr Machielse at first instance. It was open to so find accordingly, and should have been so found.
- 58 Further, that the failure to use the program, Microsoft Project, meant a great deal of extra work for the members of a small office, which consisted of Mr Thompson, the Francis brothers, Ms Noeline Whiteford, and Mr Machielse, was the subject of evidence which was not contradicted or shaken. It was open to so find, and it should have been so found.
- 59 It was not contradicted or challenged either that after Mr Machielse's employment ended, a number of defective purchase orders and schedules were found. These required Mr Gary Francis to spend several days putting them on the computer. It was open to find that that occurred, and should have been so found.
- 60 A major source of difficulty arose concerning Mr Machielse's knowledge and application of the computer program, Microsoft Project. Mr Machielse agreed in evidence that he was given an instruction manual when he first commenced work in relation to Microsoft Project. He was told to take the first week of his employment to familiarise himself with it. He was also told that Mr Thompson, Mr Gary Francis and Ms Whiteford were available to instruct him in its use.
- 61 Mr Machielse's evidence was that during the first week of his employment Nu-West was moving premises, and, impliedly, that that was disruptive. Boxes were being moved and so forth. He said that this interfered with his familiarising himself. He also gave evidence that, at that time, the connection of the computer to the power was fouled. Mr Gary Francis said that this was caused by the positioning of Mr Machielse's chair, and that the situation was remedied. Mr Machielse also complained that, later on, and he implied deliberately, there were difficulties with the operation of his computer, caused by his employer.
- 62 Ms Whiteford said that she thought that Mr Machielse knew what he was doing, later on, with the computer. Mr Gary Francis said that he seemed to be able to produce material on the computer. Mr Gary Francis said, also, that to learn the program was very simple because "the disk opened itself". He also gave evidence that Mr Machielse had sufficient knowledge of the computer. As a matter of fact, Mr Machielse did produce purchase orders on the computer. Further, after 2 September 2002, at Mr Machielse's request, Mr Gary Francis loaded the requisite disk onto Mr Machielse's home computer so that he could practise and learn the program at home.
- 63 What was said on behalf of Nu-West, in evidence by the Francis brothers, was that Mr Machielse did not improve in his use of the Microsoft Project program in the two and a half months that he was employed, and produced no electronically produced project reports. He did produce manual reports. Mr Machielse did not dispute that that is what occurred. Mr Machielse's evidence of his inability to use the Microsoft Project program and produce electronically schedules or reports was directed to exculpating himself from the failure to do so, since that failure played such a great part in his dismissal.
- 64 Mr Gary Francis opined in evidence that Mr Machielse was not interested in learning.
- 65 Mr Machielse, in evidence, was critical of the way the operation of Nu-West was run in quoting and other processes. He alleged that Mr Gary Francis had acted incorrectly in having him sign a letter which Mr Robert Francis wished to use in

relation to an application for finance from a bank. It is not at all clear, on the evidence, that it was incorrect to do so. (TFI 16).

- 66 Mr Machielse also sought to exercise authority which he did not have in that he wished to do things in the manner in which he thought they should be done. His own evidence provides some corroboration of the evidence of the Francis brothers in that respect. Indeed, his evidence contains clear criticisms of the way that Nu-West was run and conducted its business.
- 67 Another head of complaint was that Mr Machielse sought to play one brother off against the other by going over the head of Mr Gary Francis, to whose direction he was subject, to Mr Robert Francis. Both gave evidence of this. Mr Machielse denied it. Mr Robert Francis gave evidence that he clearly told him not to do this. That this occurred was confirmed in the unshaken evidence of Mr Gary Francis and Mr Robert Francis, and it was open to find that Mr Machielse had acted in this manner. That is particularly open because Mr Machielse's evidence was not convincing on this point on a fair reading.
- 68 Another head of complaint against Mr Machielse was that he was disrespectful to the Francis brothers, and, inter alia, raised his voice to them by way of overbearing them in discussions. Mr Gary Francis complained of this, as did Mr Robert Francis. Mr Robert Francis said that Mr Machielse tended, and I paraphrase, to act as an "overlord" to Mr Gary Francis.
- 69 Mr Machielse said, in evidence, that he liked the Francis brothers and that he got on well with them. He also said that he had a loud voice, he knew.
- 70 Ms Whiteford gave evidence that Mr Machielse was personable, but that he raised his voice to the Francis brothers, something that she would not do because "it is not the done thing". She did admit in cross-examination that Mr Machielse may have been raising his voice on the telephone when she heard him.
- 71 It is noteworthy that Mr Machielse's evidence that he liked the Francis brothers and got on well with them was inconsistent with his evidence that Mr Robert Francis was a bully, that Mr Robert Francis took his anger out on Mr Machielse on 2 September 2002 because of a disappointment with the construction of his own unit, that Nu-West was in financial difficulty and that is the reason why he was dismissed, and that Mr Robert Francis, by having him sign the letter to the bank, which I have referred to above, was acting inappropriately. It is also inconsistent with his trenchant criticisms of the way in which the place was run on about three counts, and his discourteous correspondence by email after his dismissal.
- 72 Another complaint against Mr Machielse was that he did not adhere to Nu-West's quote obtaining practice. This practice worked as followed. Three quotes at least were obtained in relation to "each major function" of a contract. One of those quotes was required to be obtained from a person from the Nu-West list of preferred contractors. This was a person who had done work previously for Nu-West and whose work was proven to be satisfactory. It was to the advantage of Nu-West to have reliable persons to do their work, and therefore, to have a list from whom to draw and to use them. The evidence was quite clear that Nu-West liked to use such contractors and would even accept a quote from such a person which was up to five percent higher than that of the amounts of other quotes. It also made the process simpler (see the evidence of Mr Robert Francis). Mr Machielse did not deny that this was the practice, and did admit to one failure to comply with the practice. It was clear from his evidence that, in fact, he did not approve of it. It was open to find, and it should have been found, that he did not comply with the requirements in this respect, as the Francis brothers said in their unshaken evidence on the point.
- 73 There was also criticism of Mr Machielse's failure to keep his mind on the job and his spending time with other "entities" in the same building. This was the evidence of Mr Robert Francis and Mr Gary Francis. It was not convincingly denied, and it was open to find that this had occurred. It should have been so found.
- 74 Next, there was a criticism of Mr Machielse on the basis of his alleged failure to properly carry out quote comparisons, which is an essential check of quotes before a quote is accepted. What one does, as I understand the evidence, is to compare the quotes in price, and, in particular, in price per item, ensuring that such quote is directed to all of the items required to be quoted for. This Mr Machielse failed to adequately do. It was open to so find and it should have been found.
- 75 It was the uncontradicted evidence of Mr Robert Francis that in the housing industry there is a standard housing industry contract which is used which incorporates a code of workmanship and standard housing industry association specifications. Quite surprisingly, Mr Machielse, as he admitted, was unaware of the existence of these documents which were used by Nu-West, or their use.
- 76 It was open to find that it was unusual that he should not know of them, and that, in fact, that he should have if he were involved in obtaining quotes and comparing quotes and raising purchase orders, or merely because of his employment.
- 77 It was the evidence of Mr Gary Francis that he instructed and directed Mr Machielse at the beginning of his employment and on many occasions thereafter that he was required to have all purchase orders, which were computer generated, counter-signed by him. On a number of occasions he simply omitted to do so. Mr Machielse's explanation for this was that he was not required to. He did not say that he had complied with this direction. It was open to accept Mr Gary Francis' evidence and to find that he did not comply with this direction on a number of occasions.
- 78 In addition, he raised a mistaken purchase order (3208A) with a number on it which was simply not available on the computer. Further, he raised another purchase order (M22), a purchase order which was a limited category order available to be used only by Mr Matthew Francis, Mr Gary Francis' son, and which was limited in amount to \$500.00. It was to be raised manually. Mr Machielse was unable to explain why he used it and why he used it for an amount in excess of \$500.00.
- 79 A major source of complaint against Mr Machielse was that he failed to complete more than about four project schedules or plans and that he did not generate any project plan or schedule electronically, in any event; and that, further, he failed to do so despite continual requests and directions at weekly meetings with the Francis brothers or on other occasions. These schedules are schedules of dates and time and quantities for work being done on the various houses being built. They dealt with and deal with things such as delivery dates for materials, the dates and times when contractors would work on sites, and other matters of programming for the construction of the houses. They were obviously essential to the proper running of the business and the efficient construction of the houses. They were also programmed on the computer for updating and alteration as arrangements for the building of the houses were made or altered. They were updated, at the most, once a fortnight and preferably once a week. It was necessary for these programs to be available with advance times on them. They were also required for consideration at meetings. There was uncontradicted evidence from the Francis brothers that manual documents cannot be included in the system, which is entirely credible and understandable.
- 80 These schedules were also available on the computer to all who wished to use them or know about them for their own planning purposes, and were so used within Nu-West and within other related entities in the same building.
- 81 It was quite clear, on the evidence, that if the schedules were not properly drafted and kept up to date and the reports from them made, things could go badly wrong. As it was, because, as he did not dispute, Mr Machielse's failure to produce schedules put extra work on the shoulders of the Francis brothers and Mr Thompson, which was Mr Gary Francis' uncontradicted evidence.

- 82 The importance of carrying out this particular duty properly was plainly reinforced by the continuing requests for computer generated schedules by both the Francis brothers. These requests were never complied with at any time. It was the evidence, and it was open to so find. Only manual schedules were produced by Mr Machielse, and, on my understanding of the evidence, only four of them, although Mr Machielse gave the somewhat inexact figure and guessed 20 to 50.
- 83 Eventually, Mr Robert Francis, on his own evidence, had had enough. On 2 September 2002, he called Mr Machielse into his office and gave him a cheque and dismissed him when Mr Machielse failed again to produce a computer report or schedule, as requested, electronically. Mr Machielse gave evidence that he was not dismissed and that he thought that the cheque was a bonus. Nonetheless, the cheque was returned by Mr Machielse after the notice of dismissal was withdrawn. Mr Machielse's evidence was simply not credible on that point, and also because of the evidence of Mr Robert Francis and Mr Machielse that he asked to be given his job back and was given it back. Mr Robert Francis said that he would give Mr Machielse one last chance and did so. That last chance, however, was dependent upon his producing the electronic report or reports required.
- 84 Mr Machielse also said, which was denied by Mr Robert Francis in evidence, that there was an error in the construction and design of the concrete base of a unit being built for Mr Robert Francis, and he took it out on Mr Machielse. That is the reason Mr Machielse explained that the dismissal occurred. It is quite clear on the evidence that it was not.
- 85 Mr Machielse's conflicting explanations of the dismissal of 2 September 2002 and matters about the event do not make his evidence credible in this respect or at all. It is quite clear that he was dismissed and then given another chance, even on his own evidence. It is also quite clear, and this was the third time that he had helped Mr Machielse in this respect, that Mr Gary Francis loaded the disks to learn Microsoft Project onto Mr Machielse's home computer, after the reversed dismissal.
- 86 It is also significant that there is no evidence from any witness, including Mr Machielse, that Mr Machielse, on the occasion of the dismissal of 2 September 2002, denied the validity of the complaint made against him or offered any explanation for his failure to produce the report. After that, he again failed to produce the electronically produced report or schedule as required, producing only a manual report, and was then dismissed. Mr Gary Francis admitted in evidence that he had "been in bat" with his brother for Mr Machielse to keep his job, but was unsuccessful. In any event, Mr Gary Francis was, notwithstanding, unshaken in his criticisms of Mr Machielse, asserting quite clearly that he could not be reinstated.
- 87 On the evidence, Mr Machielse did not protest when he finally was given notice of dismissal by Mr Robert Francis in the presence of Mr Gary Francis and Mr Paul McCafferty, the company secretary. After the event, he forwarded a quantity of discourteous emails to Mr Robert Francis, which demonstrated that he had no difficulty in his use of the computer, at least in the use of email.
- 88 On a fair reading of the evidence, Mr Machielse's evidence was inconsistent and unreliable and at times instead of answering questions in cross-examination he tended to bluster.
- 89 The Commissioner at first instance found correctly to that effect. It was open to him to so find, and he should have so found.
- 90 The Commissioner also considered that the evidence of Mr Robert Francis, Mr Gary Francis and Ms Noeline Whiteford was direct, honest and temperate, which again, on a fair reading of the transcript, it was open to him to so find, and he should have so found.
- 91 The Commissioner also found and found correctly that Mr Machielse's evidence was often inconsistent. Mr Machielse's evidence about 2 September 2002 is most conspicuously a case in point.
- 92 The Commissioner also found that Mr Robert Francis' complaint that Mr Machielse would seek to dominate conversations with the loudness of his voice was made out. It was open to so find, both on the evidence and on the Commissioner's own observation of him at the first hearing.
- 93 The Commissioner also correctly found, in relation to the question of inconsistency, that Mr Machielse, on the one hand, said that he got on well with the Francis brothers and liked working with them, but, on the other hand, described Mr Robert Francis as a bully. He also endeavoured to impute impropriety to Mr Robert Francis in having him sign the letter to the bank to which I have referred above.
- 94 It was also open to find, and correct to find, that Mr Machielse did not ask for or ask for sufficient assistance to render himself able to use the computer and the Microsoft Project program properly. It was also open to find that assistance to use the programme properly, and instruction in relation to it, was available from Mr Gary Francis, Mr Thompson, from a disk, from a manual and from Ms Whiteford.
- 95 It was open to find that the computer and Mr Machielse's inability to produce computer generated project schedules was the reason for his dismissal and a key element of the evidence. It was also correctly found.
- 96 It was also open to find that Mr Machielse did not produce electronically produced project reports, as he clearly did not. He did not assert otherwise. He produced only a few schedules and those manually. This inability and/or failure, it was open to find, for the reasons which I have expressed above, was a major flaw in Mr Machielse's performance of his work. Its effects, for the reasons which I have expressed above, were serious. As a result, as was found, Mr Robert Francis was justified in being dissatisfied with Mr Machielse's performance.
- 97 It was open to find, too, that not only did Mr Machielse not apply himself to the proper use of the computer when he should have and was directed to, but that he did so fail when all of the necessary support and material was available to him to learn the required program.
- 98 It was also the fact, and open to be found, that in relation to the purchase orders 3208, 3208A and M22, that Mr Machielse, who was responsible for them, did not complete them properly and/or used order numbers which were inapplicable or unauthorised and in one case issued an incomplete order which amounted to a blank cheque drawn on Nu-West for the contractor to whom it was forwarded.
- 99 It is also clear, and the Commissioner was entitled to so find, that despite numerous directions, requests and requirements, and his position as Mr Gary Francis' subordinate, Mr Machielse did not, on a number of occasions, obtain Mr Gary Francis' counter-signature to purchase orders. It should have been so found. It was open to find, and it should have been found, that Mr Machielse resented being subordinate to Mr Gary Francis and doing minor and subordinate jobs. His own submissions implicitly admitted that (see paragraph 30 (supra)).
- 100 It is also clear that again, contrary to instruction and direction, Mr Machielse failed to perform his duty in relation to the quoting system and he used his own judgment instead of complying with his instructions. It was open to so find, and it should have been so found.
- 101 It was also open to find and correctly found that he was dismissed on 2 September 2002 for failing, as he had failed on a number of previous occasions, to produce a computer schedule or report, this time for a single house, to demonstrate that he could and would perform his job as directed.

- 102 Further, after discussions with the Francis brothers, and agreeing to perform as requested on 2 September 2002, he was given another chance. Mr Machielse did not protest about the complaint made to him about his performance, and it is quite clear, and it was open to find, that his performance was thoroughly defective in this respect. After that, however, he still failed to do what he was required and requested and directed to do, and failed to produce the computer generated schedule or report, just as he had before, and again failed to give any valid reason for so failing. He was then dismissed, and it was open to find, on all of the facts, for that reason, that it was justified on the grounds of fairness, whether it occurred after he had submitted his sponsorship application for his family to the Immigration Department beforehand or not.
- 103 I should add that there was no or no sufficient evidence to establish that Mr Machielse was dismissed because Nu-West was having financial difficulties, or even that Nu-West was having financial difficulties. The evidence clearly pointed to different reasons for his dismissal, as I have expressed.
- 104 I am satisfied that it was open to the Commissioner at first instance to find as I have said above, and, indeed, that the Commissioner should have so found. It was quite clear on the evidence that Mr Machielse did not establish that he was unfairly dismissed in accordance with the principles laid down in *Miles and Others t/a Undercliffe Nursing Home v FMWU (IAC)* (op cit). Indeed, it is fair to say that Mr Machielse, could in summary, be properly and clearly found to have been insubordinate, argumentative, unwilling to apply himself to learn and carry out directions and instructions and comply with procedures, and unable to apply himself to learn a simple but essential computer program with the help available. The dismissal, indeed, was established on the evidence to be justified and not to be unfair.
- 105 As to the alleged failure of the Commissioner to allow Mr Machielse to refer to his diary, it is not at all clear that that is what the Commissioner did. However, in any event, in some of his cross-examination he did refer to his diary. Further, there is nothing to indicate and nothing established to the effect that if that permission were refused it at all affected the outcome of the application, which was clearly and correctly determined on all of the evidence.

**Finally**

- 106 For all of those reasons, the grounds of appeal are not made out. The exercise of the discretion at first instance was not established to have miscarried, and the application was correctly dismissed.
- 107 I would, for those reasons, also dismiss the appeal.

**COMMISSIONER P E SCOTT**

- 108 I have had the benefit of reading the Reasons for Decision of His Honour the President. I agree with those reasons that the appeal has not been made out and the exercise of discretion at first instance has not miscarried.

**COMMISSIONER J SMITH**

- 109 I have had the benefit of reading the reasons to be published by the President. For the reasons His Honour gives, I agree the Appeal should be dismissed and I have nothing further to add.

**THE PRESIDENT**

- 110 For those reasons the Full Bench dismissed the appeal.

Order accordingly

**2004 WAIRC 10925**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

HANS THEODOOR MACHIELSE

**APPELLANT**

**-and-**

NU-WEST DEVELOPMENT PTY LTD

**RESPONDENT**

**CORAM**

FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY

COMMISSIONER P E SCOTT

COMMISSIONER J H SMITH

**DELIVERED**

FRIDAY, 19 MARCH 2004

**FILE NO/S**

FBA 38 OF 2003

**CITATION NO.**

2004 WAIRC 10925

**Decision**

Appeal dismissed

**Appearances**

**Appellant**

Mr H T Machielse, on his own behalf

**Respondent**

Ms M Bilston, as agent, and with her Mr E Rea, as agent

*Order*

This matter having come on for hearing before the Full Bench on the 21<sup>st</sup> day of January 2004, and having heard Mr H T Machielse, on his own behalf as appellant, and Ms M Bilston, as agent, and with her Mr E Rea, as agent, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision having been delivered on the 19<sup>th</sup> day of March 2004, it is this day, the 19<sup>th</sup> day of March 2004, ordered that appeal No. FBA 38 of 2003 be and is hereby dismissed.

By the Full Bench  
(Sgd.) P J SHARKEY,  
President.

[L.S.]

2004 WAIRC 10949

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	JOHN PAUL VOLKOFSKY	<b>APPELLANT</b>
	<b>-and-</b>	
	CLOUGH ENGINEERING LIMITED	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH	
	HIS HONOUR THE PRESIDENT P J SHARKEY	
	SENIOR COMMISSIONER A R BEECH	
	COMMISSIONER J H SMITH	
<b>DELIVERED</b>	TUESDAY, 23 MARCH 2004	
<b>FILE NO/S</b>	FBA 47 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10949	

<b>Catchwords</b>	Industrial Law (WA) – Appeal to Full Bench against decision of a single Commissioner – Appeal against decision that agent for applicant not entitled to appear – Agent not registered pursuant to s112A – Ostensible bias – Full Bench found s49(2a) requirement not met – Matter not of such importance that in the public interest an appeal should lie – Appeal dismissed - <i>Industrial Relations Act 1979</i> (as amended), s7, s29, s31, s49(2a), s97UJ, s112A
<b>Decision</b>	Appeal dismissed
<b>Appearances</b>	
<b>Appellant</b>	Mr J O’Dowd
<b>Respondent</b>	Mr N Ellery (of Counsel), by leave

*Reasons for Decision*

**THE PRESIDENT:**

**INTRODUCTION**

1 This is an appeal brought pursuant to s49 of *the Industrial Relations Act 1979* (as amended) (hereinafter called “*the Act*”), only against that part of the decision made by the Commission, constituted by a single Commissioner at first instance, on 3 December 2003 (see page 172 of the appeal book (hereinafter referred to as “AB”)), whereby the Commissioner declared, inter alia, “That Mr Justin O’Dowd is not entitled to appear as agent for the applicant for the purposes of s31 of *the Act*”. It is against that decision that the appeal purports to be made. It is not necessary to reproduce the grounds.

**BACKGROUND**

- 2 The above-named appellant filed an application in this Commission on 15 May 2003 pursuant to s29(1)(b)(i) and (ii) of *the Act* alleging that he had been unfairly dismissed from his employment by the respondent, claiming relief therefor, and claiming contractual benefits alleged to have been denied to him. That application was opposed by a notice of answer filed on behalf of the respondent, Clough Engineering Limited, by the solicitors for the respondent on 5 June 2003.
- 3 Mr Justin O’Dowd of 12 Maplestone Place, Chapman, ACT, 2611, filed in the Commission, a warrant to appear dated 23 June 2003 purporting to act for the above-named appellant, Mr John Paul Volkofsky, and proceeding under s29 of *the Act*.
- 4 By correspondence there was raised a question of jurisdiction, which is not relevant to these proceedings, but, the answer filed included the following:-
- “The respondent notes that the applicant has listed Mr Justin O’Dowd as an authorised representative. Mr O’Dowd is not a registered bargaining agent, accordingly, pursuant to s31(1) and 112A of *the Industrial Relations Act 1979* (“*Act*”), the respondent objects to any appearance or representation by Mr O’Dowd on behalf of the applicant and further seeks an order of the Commission restraining Mr O’Dowd from appearing in the matter.”
- 5 There is various correspondence about the matter to the Commissioner. In addition, the matter was dealt with by the Commissioner on written submissions. There was filed a notice to admit which was served on Mr Justin O’Dowd and Mr Volkofsky, on behalf of Clough Engineering Limited, and filed in the Commission on 1 September 2003 and replied to by a reply to notice to admit, filed on behalf of Mr Volkofsky, on 9 September 2003.
- 6 The notice to admit (pages 16-17 (AB)) required that, within seven days, Mr Volkofsky admit or deny a number of facts directed to establishing that he has an arrangement with Mr O’Dowd or an entity associated with Mr O’Dowd, verbal or otherwise, to pay for his services or otherwise reimburse Mr O’Dowd for travelling, accommodation or other services as an agent.
- 7 The reply (pages 19-20 (AB)) in fact admits that Mr O’Dowd is not a registered bargaining agent and does not otherwise answer the notice to admit, even if it were required to. Mr O’Dowd purported to appear at first instance as an industrial agent within the meaning of s112A of *the Act*. I should add that this matter is not concerned with registered bargaining agents under this *Act* who are persons limited in role and mode of appointment (see s97UJ). Mr O’Dowd was not a bargaining agent.
- 8 The Commissioner at first instance, after considering the submissions, in her reasons of 21 November 2003, found, summarised, the following:-
- (a) That Mr O’Dowd did not rely on being a legal practitioner who is permitted to appear in Western Australia in order to represent the applicant in this matter, nor is he a registered industrial agent pursuant to s112.
  - (b) That there is no provision in *the Act* which allows a person who is not registered under s112A of *the Act* but who is otherwise carrying on business as an industrial agent, to appear in proceedings in the Commission.
  - (c) That in order to appear to represent a person in the Commission, a person purporting to be an industrial agent must be registered, if the person in any way carries on business as an industrial agent or holds himself out as carrying on business as an industrial agent.

- (d) That if an agent is not so registered that person commits an offence.
- (e) That on the balance of probabilities on the information before her, Mr O'Dowd is carrying on business as an industrial agent and must be registered as an agent.
- (f) That it was unclear whether he is receiving a payment for representing the applicant, Mr Volkofsky.
- (g) That even if he was not receiving a payment, he was carrying on business for the purpose of s112A (see *Jeakings and Another v State School Teachers Union of WA and Others* (1998) 78 WAIG 1139 at 1141).
- (h) That Mr O'Dowd had not provided any evidence that he was not carrying on the business of an industrial agent.
- (i) That he had previously acted as a representative or agent in the Australian Industrial Relations Commission, but that his industrial advocacy business has been deregistered, and it was not clear that he was not currently carrying on business as an industrial agent.
- (j) That he was seeking to appear as the applicant's agent in this matter which is the work which he has been undertaking on a consistent basis for some years.
- (k) That given his history of representation in the Australian Industrial Relations Commission he was carrying on business as an industrial agent for the purposes of s112A and was not a registered industrial agent in accordance with *the Act*.
- (l) That he would not therefore be permitted to represent the applicant in relation to the application.

9 I would add, although it is not relevant to this appeal, that at first instance, the Commissioner determined that she had jurisdiction to hear and determine Mr Volkofsky's application which was another matter in dispute.

#### **THE APPEAL PROCEEDINGS, ISSUES AND CONCLUSIONS**

- 10 The appeal herein was heard by the Full Bench on 4 March 2003. Mr O'Dowd purported to appear as agent for Mr Volkofsky on the appeal. He had filed a warrant to appear as agent dated 1 January 2004 in the Commission on 2 January 2004. This was subsequent to the filing of the notice of appeal.
- 11 On the day of the hearing of the appeal, the Full Bench allowed Mr O'Dowd to be heard, and, with the consent of Mr Ellery (of Counsel) for the respondent, heard the question of the s49(2a) application and the appeal proper.

#### **OSTENSIBLE BIAS**

- 12 Next, Mr O'Dowd made a somewhat unusual submission on behalf of Mr Volkofsky. It was a submission that I as the President could properly be seen to be ostensibly biased. However, he did not, as one would normally have expected him to, submit that I should disqualify myself from sitting with my colleagues to hear and determine the appeal. That marked the unusualness of the submission. As I understand the submission, such ostensible bias might be perceived, applying the tests laid down in a number of authorities. These include for the purposes of these principles, *Re Polites and Another; Ex parte The Hoyts Corporation Pty Limited and Others* [1991] 173 CLR 78 and *Re JRL; Ex parte CJL* [1986] 161 CLR 342. Mr O'Dowd, however, made it clear in submissions that his client did not require me to cease to hear the appeal, but as I understood it, wished to ensure that he was not prevented by any plea of waiver from raising the point of bias if his principal did appeal.
- 13 These questions were also considered in detail in a large number of authorities in this Commission, including most appositely *Commissioner of Police for Western Australia v Civil Service Association of Western Australia Inc* (2001) 81 WAIG 3026 at 3027-3028 (FB) and the authorities referred to therein. The Full Bench drew Mr O'Dowd's attention to that authority. His submission of bias seemed to rely on the fact that the appellant had made an application, PRES 2 of 2004, *Volkofsky v Clough Engineering Limited* (2004) 84 WAIG 239, pursuant to s49(11), to the Commission constituted by me as the President and seeking a stay of the operation of the decision appealed against in these proceedings. That application was opposed by the respondent and heard and determined on 23 January 2004. It was dismissed that day for lack of jurisdiction.
- 14 He made no submissions about the important matters decided in the *Commissioner of Police* case (op cit). (I should also add that I refer to *Carter v Drake and Others and Drake and Others v Carter and Others* (1992) 72 WAIG 736 (PRES) which was in turn referred to in the *Commissioner of Police* case (op cit)).
- 15 The Full Bench directed Mr O'Dowd to make his full submissions directed to ostensible bias on the part of the President and to the President disqualifying himself.
- 16 Mr O'Dowd then advised the Full Bench that his principal entirely waived his rights to raise the matter of bias and the appeal was heard and determined on that basis.
- 17 Mr Ellery, who appeared for the respondent, submitted in any event, briefly, that there was no ostensible bias on the well known tests to which I have referred above. First, however, I would observe, and it was not submitted otherwise by Mr O'Dowd, that the President and no one else is required by *the Act* to hear s49(11) applications and also to preside over the Full Bench, including s49 appeals to the Full Bench.
- 18 The Commission cannot be constituted in these matters without the President.
- 19 The doctrine of necessity therefore applies and no submission of ostensible bias can be made in relation to the President (see the *Commissioner of Police* case (op cit), and *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 100 per McHugh and Gaudron JJ, as well as *Carter's* case (op cit)).
- 20 Next, even if ostensible bias were a matter which could be raised, which it could not, for the reasons expressed in the *Commissioner of Police* case (op cit), it was simply not a tenable submission.

#### **S49(2a) – DOES AN APPEAL LIE?**

21 S49(2a) of *the Act* provides as follows:-

“An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.”

22 S49 of *the Act* prescribes, subject to the section, the right of appeal to the Full Bench in the manner prescribed from any decision of the Full Bench.

23 In s7 of *the Act*, the following relevant definitions appear. ““Decision”, includes award, order, declaration or finding;” ““Finding” means a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate”.

24 It was the respondent's submission that the decision appealed against was a “finding”. It was the appellant's submission that the decision at first instance was not a “finding” as defined because it finally disposed of the matter to which the proceedings related.

- 25 It was submitted by Mr O'Dowd, on behalf of the appellant, that the question of his right to appear as agent and to act as agent, were separate and self contained. Thus, the decision at first instance finally determined and disposed of that "matter" being the matter to which the proceedings related. Further, Mr O'Dowd in submissions, disagreed with the proposition that the matter to which the proceedings related is and was the application by Mr Volkofsky, the appellant, making claims and seeking relief under s29(1)(b)(i) and (ii) of *the Act*. That that matter included the requirement to determine the questions of right of audience and practice and jurisdiction as steps only in those proceedings having no separate existence of their own, was not a proposition with which Mr O'Dowd agreed. He did not submit that the finding of jurisdiction made in the same "hearing" on the written submissions at the same time was not a "finding". It was not necessary of course, to decide that because it was not a ground of appeal but, it seems to me that such a matter was a "finding" as defined and in its nature was indistinguishable from the "finding" appealed against.
- 26 "Proceedings" are not defined in *the Act*. However, applying by analogy and with modifications to classification and definition of proceedings in the Supreme Court of this State and other Supreme Courts and courts (see *Cairns, "Australian Civil Procedure"* 3<sup>rd</sup> edition pages 79-80), proceedings in this Commission are commenced in general by application or other originating process, unless they are appeal proceedings when they are commenced by a notice of appeal.
- 27 In any event, proceedings are commenced and are prescribed to be commenced by application under various sections of *the Act* (s32, s44, s29, s54 and others).
- 28 In this case, of course, the proceedings at first instance commenced by an application under s29 of *the Act*.
- 29 A step in the proceedings, such as that at first instance, which involved an interlocutory application or similar other step, is determinative only, and does not involve the final determination of the matter the subject of the proceedings of that limited subordinate matter. There is no determination of the proceedings and it is no separate proceeding having an existence of its own. Such an application or step is made or taken only because the proceedings in which it is made or taken were instituted. That was clearly and indubitably the case with the decision appealed against in this matter which was made to determine a question which arose out of, and in the course of, the determination of the proceedings in the Commission instituted by a s29 application.
- 30 The application under s29(1)(b)(i) and (ii) by Mr Volkofsky, the appellant (the applicant at first instance), is yet to be heard and determined. That is the matter of the application requiring hearing and determination, namely, the claims under s29(1)(b)(i) and (ii) which constitute the "matter to which the proceedings relate" within the definition of "finding". That is, it is the industrial equivalent of a justiciable issue or set of issues which constitute the matter in dispute between the parties. Further, the proceedings to which the matter relates are the proceedings commenced by applications filed by Mr Volkofsky in this Commission pursuant to s29(1)(b)(i) and (ii). In that the decision appealed against does not and does not purport to finally determine or dispose of the matter of the alleged unfair dismissal and/or the claim for contractual benefits, it is a finding as defined. That is entirely clear for the reasons which I have expressed. Thus, unless the requisite opinion is reached by the Full Bench pursuant to s49(2a), the appeal does not and cannot lie.

#### **SHOULD THE APPEAL LIE?**

- 31 The application of s49(2a) has been considered by the Full Bench in a number of appeals over the years. (Recently, the Full Bench considered the application of the section in *Burswood Resort (Management) Ltd v ALHMWU* (2003) 83 WAIG 3556, per Sharkey P at pages 3563-3564 and 3568 per Smith C).
- 32 The crux of the decision at first instance and the reasons therefor, were that the respondent took objection to Mr O'Dowd having right of audience in the Commission, as an agent, under s31 of *the Act*.
- 33 The Commissioner found that Mr O'Dowd was not entitled to appear as agent in the proceedings at first instance because he was carrying on business as an industrial agent and was not registered and was not entitled to appear, having regard to s112A(1) and in particular to s112A(2) also of *the Act*.
- 34 In order for an appeal to lie under s49(2a), the Full Bench must form an opinion that the matter is of such importance that, in the public interest, an appeal should lie.
- 35 It is quite clear that it is not a matter public interest if it is not of sufficient importance.
- 36 I would also add that the relevant provisions of s112A were considered by me in *Jeakings and Another v State School Teachers Union of WA and Others* (op cit), and both sides referred to those reasons.
- 37 The main submissions for the appellant, at least as I understand them, were that that the Full Bench should reach the requisite opinion under s49(2a) of *the Act* for the following reasons:-
- (a) It was necessary for agents and prospective agents throughout this country, particularly having regard to s3, to know what rights of audience they had in the Commission.
  - (b) It was of importance that Mr Volkofsky should be able to engage the representative of his choosing, implicitly, as I understood it, in the interests of fairness.
- 38 There were opposing submissions from Mr Ellery of counsel for the respondent, in which he, inter alia, referred to *Alderson v Kingswood College* (2003) 83 WAIG 215 (FB), and on the main basis that the question raised on the appeal was a confined procedural question relevant to Mr O'Dowd and Mr Volkofsky and never likely to be relevant to anybody else.
- 39 Thus, so the submission went, there was no great public interest in the matter. Mr Ellery also submitted that this was a straightforward application of the day to day jurisdiction of the Commission exercised by the Commissioner at first instance, in the course of which, she dealt with a matter of no wide import which was unlikely to be of relevance to any class or category of individuals or potential representatives (see *Burswood Resort (Management) Ltd v ALHMWU* (op cit)).
- 40 It was also submitted by Mr Ellery that there was ample opportunity for Mr Volkofsky to instruct Mr O'Dowd to deal with this matter by adducing evidence of his right of audience or otherwise because this matter was raised before the arbitration proceedings, in conciliation proceedings on behalf of the respondent.
- 41 I would make the following observations and findings.
- 42 First, the matter does not involve a matter of law of any complexity. *Jeakings and Another v State School Teachers Union of WA and Others* (op cit) is authority for the relevant construction of s112A and s31 and the phrase "carrying on business".
- 43 Second, the obligation to be registered imposed by s112A is clear, and expressed in clear terms, and should be to any person wishing to practise as an industrial agent in this State.
- 44 Third, this matter was resolvable at first instance very readily by Mr Volkofsky instructing Mr O'Dowd to adduce evidence, which evidence was not adduced, that he was not carrying on business within the meaning of s112A or by registering as an agent under *the Act*.

- 45 Fourth, whilst it is desirable that a person should have her/his own choice of barrister and/or solicitor or agent, that issue, against the background of the practicalities of litigation is not always achievable, and the necessity to change representation even during the course of litigation, is not uncommon. That consideration in the circumstances of this case, was not a wide ranging matter of principle and could not be held to be.
- 46 Fifth, this was a straight forward matter of exercise of jurisdiction in a procedural matter, the solution to which lay in the hands to some extent of Mr Volkofsky.
- 47 Sixth, I am not at all satisfied for those reasons, that the question raised at first instance and on this appeal, has any relevance or substantial relevance beyond the parties to this case and Mr O'Dowd.
- 48 Seventh, the decision is the sort of finding made in the course of proceedings which the Full Bench, for the reasons expressed in *Burswood Resort (Management) Ltd v ALHMWU* (op cit) should be and is reluctant to regard as important within the meaning of s49(2a). That is because that sort of procedural decision should not be readily interfered with by the Full Bench.
- 49 Eighth, the matter is still readily resolvable by Mr Volkofsky and Mr O'Dowd.
- 50 Ninth, it is very much in the public interest and that of the parties, and consistent with the objects of *the Act*, that the resolution of Mr Volkofsky's claim for relief and the respondent's opposition to it be delayed no further.
- 51 Tenth, I am not at all satisfied that there is any merit in the ground of appeal which alleges that, at first instance, it was for the respondent to prove that Mr O'Dowd should have been registered as an agent, or that he had no right of audience whilst he remained unregistered. In my opinion, Mr Volkofsky had the onus of establishing that Mr O'Dowd was entitled to be heard as his agent without being registered.
- 52 It is also, in my opinion, part of an agent's duty to the Commission to act so that, consistent with the agent's duty to his principal, he is frank with and assists the Commission. A matter of registration as agent or the necessity therefor forms part of that duty.
- 53 For all of those reasons, the appellant did not establish, as he was required to do, that the Full Bench should hold the opinion that the matter of the appeal is or was of such importance that in the public interest an appeal should lie, and I joined my colleagues in so finding.
- 54 Thus, the appeal did not lie and was dismissed.

**MR O'DOWD'S APPEARANCE UPON THE APPEAL**

- 55 I would also add, although it is probably not necessary to so find, that there was no or no sufficient evidence that Mr O'Dowd was entitled to a right of audience before the Full Bench or in this Commission pursuant to s112A and s31 of *the Act*.

**FINALLY**

- 56 For all of those reasons, I agreed with my colleagues to dismiss the appeal.

**SENIOR COMMISSIONER A R BEECH:**

- 57 I have had the benefit of reading the Reasons for Decision of His Honour, the President. I agree and have nothing to add.

**COMMISSIONER J H SMITH:**

- 58 I have had the benefit of reading the reasons in draft to be published by the President. For the reasons His Honour gives, I agree the Appeal should be dismissed and I have nothing further to add.

**THE PRESIDENT:**

- 59 For those reasons, the appeal was dismissed.

2004 WAIRC 10813

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	JOHN PAUL VOLKOFSKY	<b>APPELLANT</b>
	-and-	
	CLOUGH ENGINEERING LIMITED	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER J H SMITH	
<b>DELIVERED</b>	THURSDAY, 4 MARCH 2004	
<b>FILE NO/S</b>	FBA 47 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10813	

<b>Decision</b>	Appeal dismissed
<b>Appearances</b>	
<b>Appellant</b>	Mr J O'Dowd
<b>Respondent</b>	Mr N Ellery (of Counsel), by leave

*Order*

This matter having come on for hearing before the Full Bench on the 4<sup>th</sup> day of March 2004, and having heard Mr J O'Dowd, on behalf of the appellant, and Mr N Ellery (of Counsel), by leave, on behalf of the respondent, and the Full Bench having heard and determined the matter, and the Full Bench not being of the opinion that the matter is of such importance that in the public interest an appeal should lie, and the Full Bench having determined that reasons for decision will issue at a future date, it is this day, the 4<sup>th</sup> day of March 2004, ordered that appeal No FBA 47 of 2003 be and is hereby dismissed.

By the Full Bench  
(Sgd.) P J SHARKEY,  
President.

[L.S.]

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## FULL BENCH—Matters referred under Section 27—

2004 WAIRC 10947

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
<b>PARTIES</b>	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS  <b>-and-</b> SANWELL PTY LTD AND THE CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA
	<b>APPLICANT</b>
	<b>RESPONDENTS</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
<b>DELIVERED</b>	MONDAY, 22 MARCH 2004
<b>FILE NO/S</b>	FBM 8 OF 2003
<b>CITATION NO.</b>	2004 WAIRC 10947

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<b>Catchwords</b>	Industrial Law (WA) – Referral of questions of law to Full Bench, s27(1)(u) – Intervention pursuant to s30(2) – Issue of whether certain clauses of an industrial agreement registerable under s41A – Definition of bargaining agent – Bargaining agent’s clause – Industrial agreements, s41 – Definition of “industrial matter” – Bargaining agent and sub-contractor clause – Industrial matters – Issue of registration of agreements containing ‘non-industrial’ matters – Mere presence of one or more ‘non-industrial’ matters does not render the agreement one which is not with respect to any industrial matter – <i>Industrial Relations Act 1979</i> (as amended), s6, s7, s27(1)(u), s30(2), s41, s41A, s96B, s96C, s97U(1), s97UA, s97UJ – <i>Workplace Relations Act 1996</i> , s170VA, s298A, s298B, s298C, s298G, s298K, s298L, s298U, s298Y – <i>Minimum Conditions of Employment Act 1993</i> , s19, s20A, s21
<b>Decision</b>	Determination of questions of law pursuant to s27(1)(u) of the Act
<b>Appearances</b>	
<b>Applicant</b>	Mr T J Dixon (of Counsel), by leave, and with him Mr T R Kucera (of Counsel), by leave
<b>Respondents</b>	Mr K Richardson, as agent, on behalf of Sanwell Pty Ltd, and Mr K J Dwyer on behalf of The Chamber of Commerce and Industry of Western Australia
<b>Intervener</b>	Mr D S Ellis (of Counsel), by leave, and with him Ms Z M Weir (of Counsel), by leave

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*Reasons for Determination of Questions of Law Pursuant to S27(1)(u) of the Act*

### INTRODUCTION

- 1 These are the joint reasons for decision of the President and Commissioner J F Gregor.
- 2 This is a referral of questions of law to the Full Bench pursuant to s27(1)(u) of the *Industrial Relations Act 1979* (as amended) (hereinafter called “*the Act*”).
- 3 By s27(1)(u), the Commission may, in relation to any matter before it, with the consent of the President, refer to the Full Bench for hearing and determination by the Full Bench any question of law, including any question of interpretation of the rules of an organisation, arising in the matter.

### S27(1)(u) MATTERS – THE FUNCTION OF THE FULL BENCH

- 4 S27(1)(u) prescribes a procedure which relates to questions of law. The Full Bench in a s27(1)(u) referral has no power to make findings of fact. The relevant facts must be ascertained by the Commissioner at first instance or agreed before the question or any part of it can be answered by the Commission. This is in contradistinction to the broader powers of the Full Bench on appeal under s49 and s84 of *the Act* (see *TWU v The Readymix Group (WA) and Others* (1980) 60 WAIG 1483 (FB) and *AWU v ABLF* (1988) 69 WAIG 527 (FB)).
- 5 The questions referred by the Chief Commissioner arise from s32 conferences conducted between The Construction, Forestry, Mining and Energy Union of Workers (hereinafter called “the CFMEU”), an “organisation” as that term is defined in s7 of *the Act*, and Sanwell Pty Ltd (hereinafter called “Sanwell”), an employer, before the Chief Commissioner and pertain to an industrial agreement entered into by the above-named parties.

6 The questions of law which were referred are contained in a memorandum of 27 October 2003, from the Chief Commissioner to the President, and which the President consented to and referred to the Full Bench, and a copy of those questions was forwarded to the parties. We will refer hereinafter to its terms.

**APPEARANCE BY THE CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA**

7 The Chamber of Commerce and Industry of Western Australia appeared on this hearing in the Full Bench because it became a party to the proceedings at first instance by virtue of s29(1)(b) of *the Act* because it was served with a copy of the proceedings at first instance.

**LEAVE TO INTERVENE – THE MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS (COMMONWEALTH)**

8 The abovementioned Minister, The Honourable, the Minister for Employment and Workplace Relations (the Federal Minister), sought to intervene in these proceedings through counsel. The Honourable, the Minister, sought to intervene pursuant to s30(2) of *the Act*, on a number of grounds.

9 S30(2) reads as follows:-

“(2) The Minister of the Commonwealth administering the Department of the Commonwealth that has the administration of the Commonwealth Act may by giving the Registrar notice in writing of his intention to do so, and by leave of the Commission, intervene on behalf of the Commonwealth in any proceedings before the Commission in which the Commonwealth has an interest.”

10 “Commonwealth Act” means the *Workplace Relations Act* 1996 (hereinafter called “*the WR Act*”) of the Commonwealth (see s7). That is, of course, the Act under which and for which the Minister is responsible.

11 That means that the Minister may, by giving notice in writing of his intention to do so, which he did, intervene, but only by leave of the Commission, in any proceedings before the Commission in which the Commonwealth has an interest.

12 It was submitted that there was a divergence of opinion in industrial tribunals in Australia about these issues, which, to some extent, is correct.

13 Leave to intervene was sought in relation only to the two clauses applying to bargaining agent’s fees and sub-contractor employees, respectively.

14 The Minister plainly does not have an interest of the type referred to in *R v Ludeke and Others; Ex parte Customs Officers’ Association of Australia, Fourth Division* [1985] 155 CLR 513 at 522 (see also *Gairns and Dempsey v RANF* (1989) 69 WAIG 2343).

15 However, s30(1) and (2) of *the Act* confer a right to intervene with the leave of the Commission upon the relevant Minister of this State and the relevant Minister of the Commonwealth.

16 The right to intervene in constitutional matters in the High Court is exercised in constitutional cases and other matters by the states and others. Such a right to intervene is akin to that conferred by s30(2).

17 Such a right plainly exists under *the Act* to enable the Commonwealth Minister to take part in proceedings as an intervener where the Commonwealth has a sufficient interest in the outcome and/or matters of law which affect or might affect the Commonwealth, or matters of industrial relations which affect or might affect the Commonwealth, or, to put it generally, where the Commonwealth has a legitimate and sufficient interest in the conduct and outcome of particular proceedings in this Commission.

18 S6(g) of *the Act* throws light on this right, and reads as follows:-

“The principal objects of this Act are —

...

(g) to encourage persons, organisations and authorities involved in, or performing functions with respect to, the conduct of industrial relations under the laws of the State to communicate, consult and co-operate with persons, organisations and authorities involved in, or performing functions with respect to, the conduct or regulation of industrial relations under the laws of the Commonwealth.”

19 Of course, and obviously, s30(2) does not confer a right to intervene as a matter of course.

20 We accept, as was submitted, that the matters raised by these questions have significance in the context of industrial relations within Australia (see the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act* 2003). Particularly, *the WR Act* is a Commonwealth Act.

21 The Minister also referred to s298SA and s298SC of *the WR Act* which prohibit the payment of bargaining fees and which the Minister is opposed to. The Minister also has an interest in the building and construction industry in this country, and recently a Commonwealth Royal Commission inquired into the industry and reported to the Federal Government.

22 The Minister’s application was not objected to by Mr Dwyer, who appeared for the Chamber of Commerce and Industry of Western Australia, and, indeed, who supported the intervention. The application to intervene was opposed by counsel for the CFMEU. It was not opposed by Mr Richardson who appeared for Sanwell.

23 It was opposed by Mr Dixon (of Counsel) for the CFMEU.

24 However, the Full Bench gave leave to intervene since it was satisfied that there were matters of law with which the Minister could assist the Commission, and also matters of likely effect on industrial relations regulated by the Commonwealth legislation. These matters were limited, however, to the first two questions raised by the Full Bench in this matter. Nonetheless, there was sufficient interest for the Minister to intervene for the purposes of s30(2) of *the Act*, and the Full Bench so found.

**QUESTIONS**

25 The particular matter before the Commission in application No AG 70 of 2003, which is the number of the matter at first instance, is an application to register an industrial agreement between Sanwell and the CFMEU. That predicates the fact that an agreement has been made.

26 The questions which arise are referred to in the memorandum of the Chief Commissioner of 27 October 2003. The relevant findings of fact are also set out in the Chief Commissioner’s memorandum. It is convenient to produce the memorandum as a whole, which we do hereunder:-

- “1. Between December 2002 and May 2003 the Commission presided over a number of conferences pursuant to section 32 of the Act to address issues which had arisen in the course of parties progressing industrial agreements in the building and construction industry.

Among matters which were of concern and which remain in issue are the Commission’s power to register industrial agreements which make provision for a bargaining agent’s fee, an undertaking that an employer must not engage any sub-contractor who has not executed a certified agreement or an industrial agreement, and provision which enables employees to elect to convert all sick leave entitlements over 5 days to a cash payment.

2. The particular matter before the Commission is AG 70 of 2003, an application to register an industrial agreement between Sanwell Pty Ltd and the CFMEUW.

3. A proposed provision for a Bargaining Agents Fee to be included in the industrial agreement states:

- “(1) The employer must advise all employees prior to commencing work for the employer that a “Bargaining Agents Fee of \$500 per annum is payable to the Union on or prior to 1 March each year.
- (2) Each employee must pay the “Bargaining Agents Fee” to the Union in advance on a pro rata basis for any time which the employee is employed by the employer. By arrangement with the Union, the “Bargaining Agents Fee” may be paid in 2 instalments throughout the year.
- (3) The employer must, at the request of an employee, provide a direct debit facility to pay the “Bargaining Agents Fee” to the Union in accordance with this clause.”

In general terms the competing viewpoints about the inclusion of the above provision in an industrial agreement are that:

- The “Bargaining Agents Fee” is a matter that is properly within the jurisdiction of the Commission. It comes within the scope of an “industrial matter” as defined within section 7 of the Industrial Relations Act and where it is the subject of agreement for provision in an industrial agreement, the Commission shall, subject to the Act, register the industrial agreement; and conversely
- The “Bargaining Agents Fee” is not an “industrial matter” and therefore cannot be included in an industrial, agreement.

4. With respect to the inclusion of an undertaking that an employer not engage any sub-contractor that has not executed a certified agreement or industrial agreement, it is claimed that the proposed provision is directed at the problem of “phoenix” companies, pyramid sub-contracting and safety matters. Accordingly, the public interest is served by the inclusion of the provision.

Conversely, it is stated that the provision may constitute a breach of the Trade Practices Act (Commonwealth) and inclusion in an industrial agreement may expose a party to prosecution.

5. The proposed provision on the conversion of sick leave states:

“The employee may elect to convert all sick leave entitlements over 5 days to a cash payment. If the employee elects to convert sick leave to a cash payment, payment must be made by the employer to the employee on the last pay period prior to any closedown for Christmas.”

The concern with respect to this proposed entitlement is that it may be contrary to the terms of the “leave for illness or injury” under the Minimum Conditions of Employment Act, 1993. Therefore, it should not be included in an industrial agreement.

(THE QUESTIONS OF LAW - THE FIRST QUESTION (Our Notation))

6. The questions of law formulated for the reference for the Hon. President’s consideration are as follows:

With respect to the Bargaining Agents Fee:

- (a) (i) Is the provision of a “Bargaining Agents Fee” in the terms set out hereunder an industrial matter?
- (ii) Where the parties have agreed to the provision for a “Bargaining Agents Fee” in the terms set out hereunder, can the Commission register the Agreement under section 41A of the Act?

**“Bargaining Agent’s Fee**

- (i) The Employer must advise all employees prior to commencing work for the Employer that a ‘Bargaining Agents Fee’ of \$500 per annum is payable to the Union on or prior to 1 March each year.
- (ii) Each employee must pay the ‘Bargaining Agents Fee’ to the Union in advance on a pro rata basis for any time which the employee is employed by the Employer. By arrangement with the Union, the ‘Bargaining Agents Fee’ may be paid in 2 instalments throughout the year.
- (iii) The Employer must, at the request of an employee, provide a direct debit facility to pay the ‘Bargaining Agents Fee’ to the Union in accordance with this clause.”

These parties agree that the only finding of fact with respect to the Bargaining Agents Fee that needs to be made is confirmation of the CFMEUW policy that amongst other things provides that the union “will waive its right to seek a Bargaining Agents Fee from its financial members” and this “fact should be made clear to any employees potentially affected”.

A finding is made that the terms of the CFMEUW policy with respect to the application of the proposed Bargaining Agents Fee is that set out in the copy of the pro-forma letter under the CFMEUW’s letterhead and included as an attachment hereto.

A copy of a pro forma CFMEUW letter setting out this policy is attached.

(THE SECOND QUESTION (Our Notation))

The next question regarding the sub-contractors:

- (b) (i) Is the provision of a clause as set out hereunder which prevents the employer engaging any sub-contractor that has not executed a certified agreement or industrial agreement an industrial matter?
- (ii) Where the parties have agreed to the provision of a clause which is set out hereunder which prevents an employer from engaging any sub-contractor that has not executed a certified agreement or industrial agreement can the Commission register the agreement under section 41A of the Act?

**“Engagement of Sub-Contractors**

The Employer must not engage any sub-contractor that has not executed a certified agreement or industrial agreement.”

(THE THIRD QUESTION (Our Notation))

The last matter, the conversion of accrued sick leave:

- (c) (i) Where the parties have agreed to the provision of a clause which is set out hereunder which enables conversion of accrued sick leave credits to be bought out, can the Commission register the agreement under section 41A of the Act?

**“Conversion of Sick Leave**

The employee may elect to convert all sick leave entitlements over 5 days to a cash payment. If the employee elects to convert sick leave to a cash payment, payment must be made by the employer to the employee on the last pay period prior to any closedown for Christmas.”

7. Before matters set out in this document could be submitted to the Hon. President the parties were required to confirm the following:
- (a) That the questions of law posed above properly identify the issues to be addressed;
- (b) Apart from the finding made with respect to the CFMEUW policy on the application of the Bargaining Agents Fee, (see Attachment) there are no other findings of fact to be made to enable the Full Bench to determine the questions posed; and –
- (c) That this document contains the questions which have been framed after the parties have been given an opportunity to be heard.
8. The parties have confirmed in writing that, for their part, there are no further proceedings necessary for findings of fact, reframing the questions of law, nor for any other reasons before these matters, could be submitted for the Hon. President’s consideration for submission to the Full Bench.”

**THE FIRST QUESTION**

- 27 We turn to the first question and that raises two sub-questions. The first is whether the bargaining agent’s clause is within the jurisdiction of the Commission, that is, is it an “industrial matter” as defined. The second part of the question is whether under s41A of *the Act* the agreement is registrable pursuant to s41 of *the Act* containing the clause in that form.
- 28 The effect of the clause, on a fair reading, is as follows:-
- (a) The employer must advise all employees before they commence work for the employer that a “bargaining agent’s fee” of \$500.00 premium is payable to the union on or before 1 March in each year.
- (b) The mode of payment is in advance by an employee to the CFMEU and the fee is mandatorily prescribed.
- (c) The employer must, at the request of an employee, pay the fee to the CFMEU in accordance with the clause.
- 29 The Chief Commissioner found, as a fact, that the policy of the CFMEU in relation to bargaining agent’s fees, contained in a copy memorandum attached to the Chief Commissioner’s memorandum to the President of 27 October 2003, is as follows:-
- “For the avoidance of doubt, the CFMEUW will waive its right to seek a Bargaining Agents Fee from its financial members. This fact should be made clear to any employees potentially affected.”
- 30 There is no finding of fact about the quantum of a member’s subscription to the CFMEU or any finding as to any comparison of quantum between the \$500.00 fee proposed to be levied from non-members and the quantum of subscriptions payable by members of the CFMEU, and no finding of any advantage or disadvantage to members or non-members; nor were such findings sought at first instance.
- 31 We would first observe as follows.

**The Act – The Definition of Bargaining Agent**

- 32 A “bargaining agent” is defined in the context of Part VID “Employer–Employee Agreements”, s97U(1) of *the Act*, as meaning “a person appointed as a bargaining agent under section 97UJ”. However, it would seem that that is not what is meant by “bargaining agent” for the purposes of the agreement. There is not a proper description or definition of the term, for the purposes of the industrial agreement herein, available to the Full Bench, but it would seem to have a wider meaning than that ascribed to it in *the Act*. We say that because, under *the Act*, a bargaining agent, as defined, is a person who may be appointed by an instrument in writing by an employer or employee to be his or her bargaining agent for the negotiation and making of an employer/employee agreement (hereinafter called “an EEA”) (see s97UJ of *the Act*). A bargaining agent may be appointed in connection with the registration of an EEA, for the negotiation and making of an EEA and that includes an agreement to cancel an EEA, also.
- 33 Significantly, a bargaining agent may be appointed for the purpose of acting for an employer or an employee in connection with any question, dispute or difficulty that has arisen or may arise out of or in the course of the employment (see s97UJ(1)(d) of *the Act*). However, that, in our opinion, is limited to any employment, the subject of an EEA because bargaining agents are appointed only for purposes connected to EEA’s. Further, any person may be appointed as a bargaining agent, including an organisation or association that is registered under Part II, Division 4 of *the Act*. That is an “organisation” as defined in s7 of *the Act* (see s97UJ(1) and (2) of *the Act*).
- 34 Such an appointment may be terminated at any time by notice of termination to the agent in writing. Thus, a “bargaining agent” is a role or function created for an agent by *the Act* purely for the purposes of acting in relation to EEA’s and for no

other purpose. The agent must be appointed in writing by an employer or an employee each of who can also terminate the appointment in writing. No-one else can appoint a bargaining agent. That is, any such appointment purported to be made merely by an agreement between an organisation or association and an employer or employer organisation or association, purporting to appoint a bargaining agent for that employee, would be entirely null and void.

- 35 Under *the WR Act*, s170VA, contained in Part VID, refers to Australian workplace agreements (hereinafter called “AWA’s”), and defines a “bargaining agent”.
- 36 Again, a bargaining agent, as defined by *the WR Act* is very limited. A bargaining agent means a person or group of persons duly appointed as a bargaining agent under s170VK of *the WR Act*. S170VK is in similar terms to s97UJ of *the Act*, with one or two significant but not relevant differences. However, it is clear that a bargaining agent under *the WR Act*, just as under *the Act*, is a limited creature who is appointed to be bargaining agent of the employer or employee concerned “in relation to the making, approval, variation or termination of an AWA”.
- 37 By way of emphasis on what a bargaining agent’s role is, we should add that s97UA of *the Act* prescribes as follows:-  
 “A single employer and a single employee may make an agreement, called an employer-employee agreement, that deals with any industrial matter.”
- 38 That, of course, is in contradistinction between the sort of agreement registerable under s41 of *the Act*, which is a collective and not an individual agreement.
- 39 Statutorily such a bargaining agent cannot be appointed for any other purpose than the purposes of *the Act* and *the WR Act* and by the means prescribed in them.
- 40 In our opinion, the appointment of a bargaining agent by that name, and not for the purposes of a bargaining agent under *the Act* and *the WR Act* in the agreement between the above-mentioned parties, may well be invalid. Further, a bargaining agent might, in any event, have no place in a collective bargaining agreement because under *the Act* such an agent exists for a different and restricted category of agreement, namely an EEA.
- 41 However, that matter was not raised in argument before the Full Bench, and we do not decide it for that reason, and we further do not decide it also because it may require, for its determination, findings of fact to be made at first instance.

#### **S41 of the Act**

- 42 Next, we turn to s41 of *the Act* which applies to industrial agreements, their effect, scope, registration and duration (see also s41A).
- 43 An industrial agreement means “an agreement registered by the Commission under this Act as an industrial agreement” (see s7 of *the Act*).
- 44 S41 provides, as we have said, the mechanism for and power of registration of industrial agreements. One noteworthy feature of it is the very limited role of the Commission. The Commission, with one or two exceptions, exists solely to register the agreement reached by the prescribed parties.
- 45 S41(1) reads as follows:-  
 “(1) An agreement with respect to any industrial matter or for the prevention or resolution under this Act of disputes, disagreements, or questions relating thereto may be made between an organisation or association of employees and any employer or organisation or association of employers.”
- 46 That section is quite clear. First, there must be an agreement made between the persons, bodies or entities named in s41(1). Second, the agreement can only be made between an organisation or association of employees and any employer or organisation or association of employers.
- 47 Generally speaking, that is a manifestation of the object of *the Act* which refers to collective bargaining (see s6(ad) of *the Act*) and its promotion and the establishment of its primacy over individual agreements.
- 48 An “industrial agreement”, as defined, cannot be registered if made by any other persons or entities party to it, nor, indeed, can any such agreement be made. Specifically, no individual employee can be a party to a s41 industrial agreement (see the marked contrast with EEA’s where the opposite is the case).
- 49 It is to be noted that “organisation” is defined in s.7 of *the Act* to mean “an organisation that is registered under Division 4 of Part II”. “Association” is defined to mean “an association that is registered under Division 4 of Part II”. A council or other body, however designated, formed by and for the purpose of representing two or more organisations to the extent that they have industrial interests in common may be registered under *the Act* (see s67).
- 50 Therefore, no agreement can be an industrial agreement as defined, and no industrial agreement can be validly made or validly registered unless it is made between an organisation, an organisation of employees or association of employees and an employer and registered under *the Act*.
- 51 It is to be noted that, subject only to s41(3), s41A and s49N of *the Act*, where the parties to a s41(1) agreement apply to the Commission for registration of the agreement as an industrial agreement, the Commission shall register the agreement (see s41(2)) (our emphasis). That is, there is a mandatory requirement by the use of the word “shall” that the Commission register such agreement, and that is the Commission’s function primarily, under s41.
- 52 The agreement can only be made and registered (see s41(1)) if it is:-  
 (a) With respect to any “industrial matter” as defined in s7 of *the Act*; or  
 (b) For the prevention or resolution under *the Act* of disputes; or  
 (c) For the prevent or resolution under *the Act* of disagreements; or  
 (d) With respect to any question relating to all or any of the above.
- 53 Despite Mr Ellis’ submission for the Minister, on a fair reading, the phrase “relating thereto” refers to all of the classes of matter to which s41(1) refers and not merely “industrial matters”.
- 54 Therefore, notwithstanding Mr Ellis’ submissions to the contrary, too, an “industrial agreement” is not confined to an industrial matter, but may be made for the prevention of disputes or disagreements or questions relating to such disputes or disagreements. Insofar as this agreement was made for the prevention or resolution under *the Act* of disputes, disagreements or questions relating thereto, it is therefore within the jurisdiction of the Commission to register it whether it relates to an industrial matter or not.
- 55 Substantially, the agreement and the subject clause do relate, on a fair reading, to an “industrial matter” as defined, as we will observe hereinafter.

56 The registration is, of course, subject to s41(3) of *the Act*, which empowers the Commission, by the use of the word “may”, to require the parties thereto to effect such variation as the Commission considers necessary or desirable for the purpose of giving clear expression to the true intention of the parties. It is to be noted, of course, that that is a very limited power and is directed not to the alteration of the agreement, save and except to give it clear expression so that the true intention of the parties who make the agreement is reflected in it (see s56 of the *Interpretation Act* 1984 (as amended)).

### **Industrial Matter?**

57 Since this clause is part of an agreement which is plainly for the prevention or resolution of a dispute or disputes or questions relating thereto, in its form and substance, the clause is within the definition of an industrial matter, within jurisdiction, and can form part of the agreement as registered, for those reasons.

58 If we are wrong in the view that the agreement does not necessarily have to be one made “with respect to an industrial matter”, then we consider the nature of the two clauses in question and what they say, and we do so, in fact, because that is the first question referred.

59 We have reproduced above the first clause which relates to the question of bargaining fees. What it says, in effect, is that the employer is required to advise all employees prior to commencing work for the employer that a “Bargaining Agents Fee of \$500 per annum is payable to the Union on or prior to 1 March each year”.

60 There are other requirements of the employee, namely that each employee must pay the “Bargaining Agents Fee” to the union in advance on a pro rata basis for any time which the employee is employed by the employer.

61 Next, the employer is required by the clause, at the request of an employee, to provide a direct debit facility to pay the “Bargaining Agents Fee” to the union in accordance with this clause.

62 Suffice it to say, as we have said above, too, that although it was not raised by the parties before us, we have doubts that such a clause can be valid because a “bargaining agent” exists under both *the Act* and *the WR Act* for the limited purposes expressed in those Acts.

63 We now turn to consider the question of whether the clause is an “industrial matter” as defined, and whether, in 2002, the definition of “industrial matter” was substantially amended (see the *Labour Relations Reform Act* 2002).

64 There is a great deal of authority in the High Court, the Federal Court, the Industrial Appeal Court, and in the courts and tribunals of other States about the definition of “industrial matter” and the federal definition of “industrial dispute”. In our opinion, the first step to be taken is to deal with the construction of the definition of “industrial matter” in s7 of *the Act*.

65 It is to be noted that the definition of “industrial matter” in *the Act* is and has been enlarged or extended by the use of the well known extending word “includes” (see *R v Holmes and Others; Ex parte Public Service Association of New South Wales and Another* [1977] 140 CLR 63 at 72).

66 We also observe that the definition of “industrial matter” has, by the amendments of 2002 (the *Labour Relations Reform Act* 2002), been substantially enlarged, and the value of authorities decided in the Industrial Appeal Court before that date, insofar as they are limited to the more limited words of “industrial matter” as it was then defined, are not so apposite.

67 The definition should be interpreted in accordance with the approach taken by the High Court in *R v Coldham and Others; Ex parte The Australian Social Welfare Union* [1983] 153 CLR 297 at 312 where whilst interpreting the then definition of “industrial dispute” in *the WR Act*, Their Honours said, per curiam:-

“The words are not a technical or legal expression. They have to be given their popular meaning -- what they convey to the man in the street. And that is essentially a question of fact.”

68 A further indication of the approach to be taken is that contained in the dicta of King CJ (Mohr J agreeing) in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* [1981] 26 SASR 535 at 537-538 (In Banco). Referring to the definition of “industrial matter” in the South Australian Act, which was in similar terms to the first paragraph of the definition in *the Act* before the amendments of 2002, he said:-

“The natural meaning of these words is wide and I see no reason to restrict the natural meaning. The Act manifests a clear intention to give the Industrial Commission wide powers to adjudicate upon and to resolve disputes concerning matters which might reasonably be regarded as affecting the employer and employee relationship or which might be the source of disharmony in that relationship.

Clearly, there may be causes of disharmony between employers and employees which are totally unrelated to the relationship and which could not be regarded as arising from or relating to industrial matters, but, to my mind, the legislature has indicted its will that the Industrial Commission should be a tribunal to which employers and employees can resort to have a decision upon all issues which can legitimately be regarded as industrial issues and which might otherwise result in industrial conflict. If this is the true policy of the Act, as I think it is, it would be quite inconsistent with that policy to place a restrictive interpretation upon the naturally wide meaning of the words “affecting or relating to” in the definition.”

69 We respectfully adopt those dicta and apply them in construction of the definition of “industrial matter” in *the Act*.

70 The clause under consideration in that case was a clause which sought to prohibit a principal party from entering into a contract or arrangement with a contractor for the supply of labour unless the principal’s contract or arrangement with the contractor had in it clauses or agreements, in respect of such labour, binding the principal to the observation of conditions not less than those in the award.

71 Whilst we follow what Parker J (Kennedy J agreeing) said in *RGC Mineral Sands Ltd and Another v CMETSWU* (2000) 80 WAIG 2437 at 2443 about the inapplicability of reasoning directed to the nature of an industrial dispute, in interpreting the definition of “industrial matter” in *the Act*, assistance can clearly be derived, and we do derive it from the High Court authorities to which we refer hereinafter. In so saying, we note that the term “industrial dispute” and the definitions generally in the Federal Acts are narrower than that which now appears in *the Act*. The general part of the definition of “industrial matter” in s7 of *the Act* reads as follows:-

““**industrial matter**” means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to ...” (our emphasis)

72 There follow the items of expanded definition of a particular kind, some of which we refer to hereinafter.

- 73 It should be noted that the word “includes” is a word which expands the definition. It should also be noted that the particular items of definition, which appear after what we have just quoted above, are specifically expressed not to limit the generality of the first six lines of the definition in s7 of the Act.
- 74 (It is necessary also to look generally at the analysis of the definition as it was formerly, which the Full Bench undertook in *Hamersley Iron Pty Ltd v AMWSU* (1990) 70 WAIG 3001 at 3006-3008 (FB), and the authorities cited therein).
- 75 The words now are “any matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees in any industry ...”. (The words “or pertaining to” were added in 2002).
- 76 The words “pertaining to” mean “belonging to” or “within the sphere of” (see *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* [1987] 163 CLR 117 at 134 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
- 77 Such an approach is fortified by the naturally wide meaning of the words in the definition of “industrial matter” in s7 of the Act, which words are even wider than those referred to in the South Australian Act in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) or those words which defined “industrial matter” before the amendments of 2002.
- 78 The words “affecting or relating to” alone must be read widely and unrestrictedly, and, in our opinion, for the reasons expressed hereinafter, are sufficient to render the clause an “industrial matter”. The definition has been widened so that any matter “affecting or relating or pertaining to” the relationship between employers and employees is an industrial matter, and, a fortiori, must be read widely and unrestrictedly (see *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) per King CJ and see *Hamersley Iron Pty Ltd v AMWSU* (FB) (op cit)).
- 79 In particular is it made clear in that case that such a definition includes “the relations of employers and employees”. Paragraph (ca) of the definition “industrial matter” in s7 of the Act, which has now been added, expressly uses the words “the relationship between employers and employees” and augments the definition.
- 80 Dixon CJ noted, too, in *R v Findlay and Another; Ex parte The Commonwealth Steamship Owners’ Association and Others* [1953] 90 CLR 621 at 629-630 that although the possibility of an indirect and consequential effect is not enough, the conception of what arises out of or is connected with industrial relations includes much that is outside the contract of service, its incidence and the work done under it.
- 81 Paragraph (ca) of the definition of “industrial matter” in s7 clearly reflects that view legislatively.
- 82 His Honour said at page 630:-  
“Conditions affecting the employee as a man who is called upon to work in the industry and who depends on the industry for his livelihood are ordinarily taken into account.”
- 83 Dixon CJ went on to approve what Isaacs and Rich JJ said in *The Australian Tramway Employees’ Association v Prahran and Malvern Tramway Trust and Others* [1913] 17 CLR 680. Isaacs and Rich JJ said at pages 693-694:-  
The ‘conditions’ of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment.  
And the words ‘employers’ and ‘employees’ are used in the Act not with reference to any given contract between specific individuals, but as indicating two distinct classes of persons co-operating in industry, proceeding harmoniously in time of peace, and contending with each other in time of dispute.”
- 84 We respectfully apply those dicta.
- 85 We refer to the application of these dicta by the Full High Court in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* (op cit) at page 134). Their Honours in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* (op cit) referred to the extended definition under their consideration by reference to a different but similar part of the definition of “employee” ((ie) similar) to the definition of “employee” in the Act in one respect. The definition of “employee” in s7 of the Act includes “any person whose usual status is that of an employee”, and, since the definition of “industrial matter” depends on the definition of “employer” and “employee” in the Act it is an expanded definition because of that expanded definition of “employee”, just as the definition was expanded for a similar reason in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors’ Association Ltd and Others* (op cit).
- 86 In paragraph (b) of the definition of “industrial matter” in s7 of the Act, “industrial matter” is defined to include any matter affecting or relating to the “conditions of employment”, so that dictum is plainly relevant, and we apply it in this case.
- 87 Some attention to similar clauses has been paid in other jurisdictions.
- 88 A Full Bench of the New South Wales Industrial Relations Commission in *Re Review of the Principles for Approval of Enterprise Agreements 2002* [2002] NSWIR Comm 342 (NSWIRC FB) considered a clause which in that case was not materially different from the clause in this case for the purpose of deciding the questions of law raised (see pages 4 and 5 of that decision).
- 89 It must be observed that in that case, whether the clause was within the jurisdiction for the purpose of registering an agreement including the clause, depended on whether the agreement was made “setting conditions of employment for employees”, which is very much more narrow than the definition of “industrial matter” in the Act. Nonetheless, having regard to the judgment in *R v Booth; Ex parte Administrative and Clerical Officers’ Association* [1978] 141 CLR 257 where the broad definitions of “conditions of employment” referred to by Isaacs and Rich JJ in *The Australian Tramway Employees’ Association v Prahran and Malvern Tramway Trust and Others* (op cit) at page 693 were approved, the Full Bench of the New South Wales Industrial Relations Commission found that such a clause was within jurisdiction. The Full Bench observed in New South Wales that such a clause might fall within the definition of “conditions of employment” in s29 of the New South Wales Act and therefore within the jurisdiction.
- 90 The Full Industrial Relations Commission of South Australia in *Ian Gregory Morrison Pty Ltd (SA) Patrol and Security Officers’ Enterprise Agreement 2002-4 (Bargaining Agents Fee)* [2003] SAIR Comm 36 also considered a bargaining agent’s fees clause, not materially different from the clause under consideration in this case, and also for the purposes of determining jurisdiction.
- 91 Enterprise agreements in the *Industrial and Employees Relations Act 1994* (SA) are referred to as instruments for the regulation of “remuneration and other industrial matters” and being made “about remuneration and other industrial matters”. The objects of the South Australian Act (s73) refer to the encouragement of agreements “governing remuneration, conditions

of employment and other industrial matters". That is not so different from the objects in s6 of *the Act* which are to bring about fair conditions, inter alia.

- 92 The South Australian clause was held in *Ian Gregory Morrison Pty Ltd (SA) Patrol and Security Officers' Enterprise Agreement 2002-4 (Bargaining Agents Fee)* (op cit) to be an "industrial matter" for the purposes of that Act (see paragraphs 63 and 64).
- 93 In Queensland, the case of *Australian Workers' Union of Employees; Queensland v Skills Training Mackay* (2002) QCIG 172 was a case in which the Queensland Commission dealt with a clause relating to a bargaining agent's fees. However, the reasons for determining that such a clause in the agreement referred to in that case was not within jurisdiction placed too much emphasis on the definition of "industrial dispute" under various Federal Acts. On a fair reading, therefore, the reasons are not helpful to the interpretation of the definition of "industrial matter" in this State. In any event, the definition of "industrial matter" in that State is much narrower than the definition in *the Act* (see page 176). We would not therefore apply that decision, for those reasons.
- 94 We turn first to the general part of the definition of "industrial matter" in s7 of *the Act*. The imposition of a bargaining agent's fee and the manner of its payment or collection is any matter affecting or relating to or pertaining to ((ie) belonging to or in the sphere of) the work of employees in the building industry. It is also a matter affecting or relating or pertaining to the wages, salaries or other remuneration of employees. In so finding, we adopt what was said by the Full Industrial Commission of South Australia in *Ian Gregory Morrison Pty Ltd (SA) Patrol and Security Officers' Enterprise Agreement 2002-4 (Bargaining Agents Fee)* (op cit).
- 95 The clause before the Full Bench in this matter is an "industrial matter" as defined in *the Act*. The relevant authorities and the words of the definition to which we have referred above require the Commission to adopt a wide meaning for the definition and all parts of the definition of "industrial matter" so as to include any matter that might be reasonably regarded as affecting the employer and employee relationship, or which might be the source of disharmony in that relationship. Quite clearly, payments to a third party may be an industrial matter, depending on the character of the payee and the capacity in which that person makes the payment.
- 96 The subject clause adjusts the manner in which the employees are to be paid, and this means that the provision governs or affects remuneration payable under the agreement and is within jurisdiction. The clause also pertains to remuneration payable. This approach is clearly consistent with those authorities which conclude that the deduction of authorised union dues was an industrial matter.
- 97 In any event, as we later conclude, the clause relates to a condition of employment in the wide sense in which the authorities above characterise that term.
- 98 This is also a matter affecting or relating or pertaining to remuneration in the manner in which paragraph (a) of the definition refers to remuneration of employees. Further, the clause is an industrial matter because the matter is one which affects or relates or pertains to conditions of employment, and, further, the mode and terms of employment.
- 99 Next, the clause relates clearly to the relationship between employers and employees since it refers to the relationship of employer and employee referred to in paragraph (ca) of the definition, particularly having regard to the dicta which we have quoted above.
- 100 The subject matter of the clause is a matter which affects or relates or pertains to work, work conditions, the environment and the use of agents to negotiate pay or conditions for employees in the working environment, because of the fact that they are employees of employers. There is a direct imposition of obligations on the employer and on employees in an industry whether union members or not.
- 101 We would add that that definition (ca) was not relied on in this case, so that we do not make a final judgment on the matter, but it is, we think, for the reasons which we have expressed, a strongly arguable approach.
- 102 Further, the clause relates clearly to the relationship between employers and employees since the matter of the clause is directly related to the relationship of employer and employee as defined, particularly having regard to the dicta we have just quoted. The clause expresses a matter which affects, relates or pertains to work, work conditions, environment and the use of agents to negotiate pay or conditions. (We adopt the reasoning in *Re Cram and Others; Ex parte New South Wales Colliery Proprietors' Association Ltd and Others* (op cit) and the cases cited above, particularly *Ian Gregory Morrison Pty Ltd (SA) Patrol and Security Officers' Enterprise Agreement 2002-4 (Bargaining Agents Fee)* (op cit) and *Re Review of the Principles for Approval of Enterprise Agreements 2002* (op cit)).
- 103 Paragraph (e) of the definition of "industrial matter" in s7 of *the Act* is another relevant definition. That reads:-
- “(e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;”
- 104 It is, it might be said, entirely clear that the right of the CFMEU, an "organisation" as defined in s7, or its privilege to levy and have collected a bargaining fee from "employees" in an industry as defined, is within the meaning of that provision, and that the clause is a matter affecting or relating or pertaining to such a right or privilege. Again, we make no final finding on that question because it was not argued, but it is fair to say that it is very much arguable.
- 105 We should add that this matter is not one which falls within paragraph (g) of the definition of "industrial matter" in s7 of *the Act*, because it does not relate to the collection of "subscriptions to an organisation", nor could it be so contended.
- 106 We now turn to paragraph (i) of the definition of "industrial matter" in s7. It is a very wide definition which includes, inter alia, any matter falling within the preceding part of the definition of "industrial matter". It reads as follows:-
- “(i) any matter, whether falling within the preceding part of this interpretation or not, where —
- i. an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and
- ii. the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;
- and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include ...”
- (There follows reference to matters excluded from the definition in paragraph (i) which relate, it would seem, to matters of freedom of association).

- 107 It is fair to say, on a fair reading, that a matter is an “industrial matter” if it is any matter which affects, relates or pertains to any matter where an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an “industrial matter”, that is as if it were an “industrial matter” as otherwise defined.
- 108 The second precondition to this occurring is that the Commission must be of opinion that the objects of *the Act* would be furthered if the matter were dealt with as an industrial matter.
- 109 In this case, the parties in reaching an agreement and placing it before the Commission by way of an application under s41 of *the Act* for registration, have complied with the first condition. It is not necessary for them to say so in those precise words when it is quite clear that by the terms of the agreement that the parties are seeking to register an agreement relating to an industrial matter.
- 110 In addition, it is plainly open to find that objects 6(aa), (ad) and (ag) of *the Act* would be furthered, and that the Commission could so find if the matter were treated by the Commission as an “industrial matter”. Those objects of *the Act* would be clearly advanced because the agreement and the clause under consideration are directed to promoting collective bargaining and to establishing the primacy of collective agreements over individual agreements. The agreement and clause are also directed to promoting goodwill within industry and enterprises within industry, as well as enabling employers, employees and organisations to reach agreement appropriate to the needs of the enterprise within it, balanced with fairness to the employees in the industry and enterprises.
- 111 Paragraph (i) of the definition of “industrial matter” in s7 of *the Act* also includes any matter, whether the parties desire it or not, the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute, within the definition of “industrial matter”. The breadth of that part of the definition is, paradoxically enough, exemplified by its express exclusion of what we might call only freedom of association related matters. Otherwise, there seems to be no limitation. In our opinion, “any matter of an industrial nature” within paragraph (i) of the definition, means a matter not essentially between employers or employees qua employers and employees as defined, but a matter which has the quality of an industrial matter (see the definition of “in the nature of” in *The Macquarie Dictionary*, (3<sup>rd</sup> Edition)). That is, it is a matter which affects or relates or pertains to a matter of an industrial nature. In itself, a matter of an industrial nature, as long as it is the subject of an industrial dispute or the subject of a situation that might give rise to an industrial dispute, is an industrial matter. A matter which is “in the nature of an industrial matter” is plainly not an “industrial matter”, in any narrow sense, otherwise there would be no need to extend the definition of “industrial matter” to include a matter in the nature of an industrial matter.
- 112 A matter, to come within that part of paragraph (i) of the definition, must be a matter in the nature of an industrial matter, and, secondly, must be the subject of an industrial dispute, which is not defined, or the subject of a situation that might give rise to an industrial dispute. Therefore, a matter which has an industrial flavour, industrial features, relates to industry, is affected by or affects industry and/or employers, employees or persons who are not employers or employees engaged in or connected to industry, and organisations or associations engaged in or connected to industry or affected by questions arising directly or indirectly in relation to an industry is a matter of an industrial nature. Paragraph (i), therefore, extends the definition of “industrial matter” substantially.
- 113 This clause indubitably would fit within paragraph (i) of the definition, because it may give rise to an industrial dispute, particularly if the agreement is not registered, and because if it is not an “industrial matter” as directly defined, which it clearly is, it is without doubt a matter of an industrial nature. Further, it is a matter which would, within paragraph (i), if an agreement is not registered be that sort of matter which is the subject of a situation that may give rise to an industrial dispute. It could clearly be so found.
- 114 The clause, as King CJ said in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit), affects, relates (or pertains) to the employer and employee relationship “in a close and obvious way”.
- 115 For all of those reasons, it is quite clear that the clause is an “industrial matter”.
- 116 We refer to Mr Richardson’s submission that the matter was not an industrial matter if the rules of the union forbade or did not empower such a course. That is arguable, but that was not one of the facts before the Full Bench. We do not therefore consider it, nor do we consider any argument that the CFMEU cannot bind itself or purport to do something under its rules which is ultra vires the rules. That, however, is a matter which the Commissioner at first instance ought to entertain if it is raised. Obviously, an organisation cannot act ultra vires its rules.
- 117 However, nothing was submitted to the Full Bench which would have us accept that it was not an “industrial matter” as defined. The Commission has jurisdiction to deal with that clause and with the agreement under s41 of *the Act*.

#### **THE SUB-CONTRACTOR’S CLAUSE**

- 118 We turn now to the second clause which relates to sub-contractors.
- 119 This, so it was submitted, was a clause which bound an employer to not enter into a contract for doing work in circumstances where “the interest which an organisation of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone else on less favourable terms” (see *R v The Commonwealth Court of Conciliation and Arbitration and Others; Ex parte Kirsch and Another* [1938] 60 CLR 507).
- 120 The effect of the clause, it was accepted by counsel and the agents who appeared, was that Sanwell was prohibited from engaging sub-contractors who themselves engaged employees whose terms of employment were not governed by an industrial agreement under *the Act* or a certified agreement under *the WR Act*.
- 121 We adopt and repeat what we said above about the general approach to the interpretation of the term “industrial matter”.
- 122 The Full Court of the Supreme Court of South Australia in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) held that the South Australian Industrial Relations Commission had jurisdiction to include in an award a provision prescribing conditions upon which employers bound by an award may engage independent contractors to do work covered by the award. That matter was decided on a definition akin to the first part of the old definition of “industrial matter” in *the Act* which used the words “affecting or relating to”, only before the words “or pertaining to” were added in 2002.
- 123 The narrower definition of “industrial dispute” was still wide enough to support the finding that a dispute about whether employees of contractors, if engaged by an employer, should be entitled to the benefit of an award binding the employer, was within jurisdiction so as to enable the South Australian Industrial Relations Commission to settle the question as incidental to a dispute about conditions of employment. The High Court so held in *R v Moore and Others; Ex parte FMWU* [1978] 140 CLR 470 at 472-473 and 478. In that case, the High Court also distinguished *R v Judges of the Commonwealth Industrial Court and Others; Ex parte Cocks and Others* [1968] 121 CLR 313, and we follow Their Honours reasoning in that case.

- 124 In *AFMEPKIU v Unilever Australia Ltd* (PR 940027) (31 October 2003) (FB) a Full Bench of the Australian Industrial Relations Commission held that “a contractors clause” was properly about a matter “pertaining” to the relationship of employer/employee in the more narrowly defined federal jurisdiction (see the definition of “industrial dispute” in s4(1) of *the WR Act* and paragraphs (a) and (b) in particular).
- 125 King CJ applied *R v Moore and Others; Ex parte FMWU* (op cit) in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) at page 539, and we refer hereinafter to what His Honour said:-
- “The significance of the case, to my mind, is that all members of the Bench recognized implicitly the connection which may exist between the employer and employee relationship and the terms and conditions upon which an employer or potential employer can have the work done by persons other than his employees.”
- 126 Their Honours held that, depending on factual findings, such a cause could be within jurisdiction of the Australian Industrial Relations Commission. However, at page 538, King CJ said this:-
- “The three clauses which the union seeks to insert in the award are designed to prevent an employer or potential employer from procuring work, which would otherwise be performed by employees under the award, to be done by subcontractors for contract prices and under contract conditions less favourable to those performing the work than those prescribed by the award. Such an application seems to me to affect or relate to the employer and employee relationship in a close and obvious way. If employers or potential employers can have work which is covered by the award done by subcontractors at cheaper rates than those prescribed by the award, employees are less likely to be able to obtain and retain employment in the industry. In some cases employees may be rendered vulnerable to pressure to accept less than award conditions thereby creating problems for the policing and enforcement of the award. In other cases, they may be vulnerable to pressure to abandon their status as employees and to accept work under contract on less favourable terms. Considerations such as these must have been present to the minds of the judges of the High Court in *In re Moore; Ex parte Federated Miscellaneous Workers' Union of Australia*.”
- 127 Zelling J also said in the same case at page 543:-
- “This is a typical contracting out clause which seeks to avoid undercutting in an industry with the consequent likelihood either of an application to reduce the rates payable under the award or of making employees redundant and therefore causing them to lose their jobs or reduce the amount of employment available to them. Employers and employees have been disputing about such things for very many years. It is the sort of thing that an employee could legitimately negotiate when considering whether to enter into a particular contract of employment and it is within the words of Bray C.J. in *The Queen v. The Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited*.” (1977) 16 SASR 6 at 8)
- 128 We would also observe that those findings relied on the words “affected or related to” in the *Industrial Conciliation and Arbitration Act 1972-1979* (SA), which, in our opinion, were quite wide enough. However, we observe that those words are narrower than the words in *the Act* which are “affecting or relating or pertaining to”.
- 129 *R v Moore and Others; Ex parte FMWU* (op cit) was a case where the draft award put forward by the union in its log of claims contained a clause to the effect that no employer should permit work covered by the award to be done under contract, except in accordance with the terms and conditions of the award.
- 130 The sub-contractor’s clause is closely akin to the clauses considered in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit) and in *R v Moore and Others; Ex parte FMWU* (op cit). It is a clause which has been agreed between the parties and which will ensure that all employees on site will be employed pursuant to collective bargaining agreements to which an organisation of employees will be a party. S41 agreements, of course, will more likely than not involve the CFMEU as a party. Thus, there is a greater likelihood that all employees on site will be engaged on the same or similar conditions. There is therefore less likelihood of the sort of problems arising which King CJ and Zelling J adverted to in *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* (In Banco) (op cit), incidentally another building industry case (see, too, *Hanssen Pty Ltd v CFMEU* (unreported) (2004 WAIRC 10828), delivered 8 March 2004, (FB) where a sub-contractor’s clause was considered in detail and held to be an “industrial matter”).
- 131 The sub-contractor’s clause, for those reasons, affects, relates or pertains to the employer and employee relationship, as King CJ said above at page 538, “in a close and obvious way”.
- 132 We would add, too, that that sort of situation where employees on the sites are subject to the same or similar conditions is certainly conducive to goodwill in the industry (see s6(a) of *the Act*), because, it is fair to observe, difficulties will not arise over different or markedly different prevailing conditions of employment. However, that observation, of course, does not relate to the question of jurisdiction.
- 133 There is a direct connection manifested in the sub-contractor’s clause between the employer and employee relationship and the terms and conditions upon which an employer or potential employer can have the work done other than by her/his/its employees.
- 134 For all of those reasons, we would find that the subject of the sub-contractor’s clause is an industrial matter and is within jurisdiction.
- 135 Further, such a matter plainly fits within the general part of the definition of “industrial matter” and paragraph (b) “conditions of employment”, and paragraph (i). We have already observed that it is strongly arguable that the subject matter of the clause fits within paragraphs (ca) and (e) of the definition of “industrial matter” in s7 of *the Act*, and therefore the sub-contractor’s clause is a matter affecting or relating or pertaining to an industrial matter in the agreement and an “industrial matter” as defined.
- 136 In particular, since the parties have agreed, pursuant to s41, that the matter is an industrial matter by making the application to register the agreement, then it is one, provided that the Commission, as it is open to do, pursuant to paragraph (i) of the definition of “industrial matter” in s7, finds that the sub-contractor’s clause helps to promote the objects of *the Act*, which it clearly does. It does so because it helps to establish the primacy of collective agreements. It provides for a means of settling industrial disputes. It also deals with a multiplicity of uncontestedly industrial matters. The sub-contractor’s clause is clearly within jurisdiction as an industrial matter. It was correctly not contended, except for the sub-contractor’s clause that any other clause was not within the definition of “industrial matter”.

**JURISDICTION TO REGISTER**

- 137 We find, for those reasons, and are satisfied, that there is jurisdiction to register the agreement, including the sub-contractor's clause.

**CAN THE COMMISSION REGISTER AGREEMENTS AND MAKE ORDERS  
CONTAINING NON-INDUSTRIAL MATTERS?**

- 138 If we are wrong in those views which we have just expounded, then we would hold that the agreement is one with respect to an industrial matter, including the clauses the subject of these proceedings, and can still be registered in this jurisdiction.
- 139 We have already said that the agreement "for the prevention or resolution under this Act of disputes, disagreements, or questions relating thereto" may be made between an organisation or association of employees and may be made between an organisation or association of employees and any employer or organisation or association of employers. This quite correctly accords with the extended definition of "industrial matter" and the objects of *the Act*, giving primacy to collective agreements.
- 140 Further, it is a construction which enables an agreement which the parties have reached to be registered, thereby preventing or resolving a dispute. That is a mechanism which reflects the objects prescribed in s6(a), (ae), (af) and (ag) of *the Act*.
- 141 Next, the CFMEU relied on the proposition that an industrial agreement can be registered under s41 of *the Act*, even if it contains matters which are not "industrial matters" as defined.
- 142 There was reliance for that proposition upon the judgment of the Full Court in *AFMEP&KIU v Electrolux Home Products Pty Ltd* (2002) 115 IR 102. Their Honours held at page 120:-

"We do not see why the presence of one or more provisions that do not pertain to the relationship necessarily takes an agreement outside the description embodied in s 170LI(1). As counsel for the Unions pointed out, s 170LI(1) does not refer to the terms of an agreement. It talks about "an agreement . . . about matters pertaining to the relationship". So it is necessary to characterise the agreement itself, considering it as a whole. An agreement for the sale of a house is an agreement pertaining to real estate, notwithstanding it includes a provision regarding furniture.

Nothing in the statutory scheme suggests that a certified agreement that, considered as a whole, answers the description of s 170LI(1) may not include a particular term that does not."

(And see *AFMEPKIU v Unilever Australia Ltd* (op cit) (FB)).

- 143 In the same manner, s41 of *the Act* talks about "an agreement with respect to any industrial matter", as we have said.
- 144 *The Act* allows the parties, not the Commission, to judge the content of the agreement. It furthers the objects of *the Act* if they do. They judge the conditions, rights, objects and subject matter. However, the agreement must be an agreement in the terms prescribed by s41 of *the Act*.
- 145 The agreement, inter alia, must be an agreement "with respect to any industrial matter". It is not restricted by those words to industrial matters only. The object is to resolve disputes in accordance with the objects of *the Act*, to create goodwill in industry, and to promote the primacy of collective bargaining. S41 is a manifestation of that.
- 146 We agree, with respect, with the dicta of the Federal Court referred to above and apply it. Clearly, if the matters in the agreement so preponderantly relate to and/or create an agreement which is not with respect to any industrial matter, then it cannot be registered because the agreement is not one with respect to an industrial matter. However, the mere presence of one or more provisions in the agreement which the parties agree are necessary to solve their differences and/or regulate their relationship and/or prevent a dispute, even though they do not affect, relate or pertain to an industrial matter as defined, does not render the agreement one which is not with respect to any "industrial matter". Such a clause is the sub-contractor's clause. It is the only clause in the agreement made by the parties so characterised. The agreement is clearly one with respect to any "industrial matter", because, on a fair reading, it is an agreement with respect to a whole lot of industrial matters. The agreement is therefore registerable for that reason also.

**ARE THERE OTHER BARS TO REGISTRATION – THE WR ACT?**

- 147 It was submitted that the bargaining agent's clause could not be registered because it was uncertain. We do not think that that was a matter raised in the questions posed by the Chief Commissioner to the Full Bench. In our opinion, therefore, the Full Bench cannot and ought not to deal with that submission.
- 148 It is not correct to submit that the parties did not reach agreement about the matters in the agreement. They did whether the clause or any clause needs more clarity of expression or not. In any event, it is a matter for the Commissioner at first instance to deal with questions of clarity of expression pursuant to s41(3) of *the Act* which exists to enable the true intention of the parties to be expressed. If that is a matter which the Chief Commissioner is of opinion should be raised, then no doubt he will raise it with the parties, but that is a matter for him, and not for this Full Bench in the questions referred to it.

**THE BARGAINING AGENT'S CLAUSE – IS IT REGISTERABLE?**

- 149 The Chief Commissioner referred a question to the Full Bench in somewhat general terms, namely whether the bargaining agent's clause can be registered under s41A of *the Act*. S41A reads as follows:-

- “(1) The Commission shall not under section 41 register an agreement as an industrial agreement unless the agreement —
- (a) specifies a nominal expiry date that is no later than 3 years after the date on which the agreement will come into operation;
- (b) includes any provision specified in relation to that agreement by an order referred to in section 42G; and
- (c) includes an estimate of the number of employees who will be bound by the agreement upon registration.
- (2) The Commission shall not under section 41 register an agreement as an industrial agreement to which an organisation or association of employees is a party, unless the employees who will be bound by the agreement upon registration are members of, or eligible to be members of, that organisation or association.”

- 150 S96B(1), (2) and (3) of *the Act* reads as follows:-

- “(1) An award, industrial agreement or order under this Act, or any arrangement between persons relating to employment must not —

- (a) require a person —
  - (i) to become or remain a member of an organisation;
  - (ii) to cease to be a member of an organisation;
  - (iii) not to become a member of an organisation; or
  - (iv) to treat another person less favourably or more favourably according to whether or not that other person is, or will become or cease to be, a member of an organisation;
- or
- (b) confer on any person by reason of that person's membership or non-membership of an organisation any right to preferential employment or to be given preference in any aspect of employment.
- (2) The prohibition in subsection (1) extends to awards, industrial agreements, orders and arrangements that are in force at the commencement of section 28 of the *Industrial Relations Amendment Act 1993*.
- (3) A requirement that is contrary to this section is of no effect."

151 It was submitted on behalf of the intervener that the bargaining clause in the agreement, at least, cannot be registered because it is unlawful. It is unlawful, so the submission went, because it is in breach of s96B of *the Act*, and therefore, of no effect.

152 There is no indication what element of s41A is the subject of the referral, or what the question of law which is referred to is, in relation to s41A.

153 S96B of *the Act* has been raised by the intervener.

154 At pages 94-96 of the transcript on appeal, Mr Dixon, who appeared for the CFMEU, made a number of submissions, in the course of responding to Mr Ellis' submissions for the Minister, in the course of an exchange with the Full Bench in which the question of Mr Ellis' submissions for the Minister were dealt with. In short, Mr Ellis' submission was that the bargaining agent's clause was not registerable and was of no effect because of s96B of *the Act*.

155 Mr Dixon's submissions can be summarised as follows:-

- (a) The bargaining agent's clause is not unlawful because if there is evidence that the intent is to apply the clause differently according to union membership then he would accept that s96B would be offended. However, he submitted that that is a question of fact.
- (b) He then went on to say this:-
 

"...difficulty of the finding put forward by the Chief Commissioner because it puts the Full Bench in a difficult position because I would have to accept that if that's true, there are real problems with section 96B."
- (c) He then submitted that, on a fair reading of the clause, that was not so.
- (d) He also developed that further by saying that, on a fair reading of the proposed clause, it is not contrary to s96B because the clause applies to "employees", and not therefore to union members or non-union members as such. Thus, if the bargaining agent's fee is set below the level of union fees everyone would pay a bargaining agent's fee, so the submission went. Thus, further, union members would pay over and above that amount "to a quantum equivalent to their union membership fees, but everyone would be paying a bargaining agent's fee". Thus, as he submitted, there would be no "discrimination" in that case.
- (e) Mr Dixon also agreed, when it was put to him by the Full Bench, that there was no finding as to what the union's fees are.
- (f) He turned his attention to the precise words of the finding made by the Chief Commissioner that "the terms of the CFMEUW policy with respect to the application of the proposed Bargaining Agents Fee is that set out in the copy of the pro-forma letter" to which we have referred above.
- (g) He submitted that the finding, in summary, was uncertain, but suggested that:-
 

"... the CFMEUW will waive its right to seek a bargaining agent's fee from its financial members. That's what it suggests and that would give rise to a difficulty because in every other registration that goes before a Commissioner that of course wouldn't be the case."

156 The policy referred to requires, inter alia, that the employer must advise all employees, not merely union members, that a bargaining agent's fee is payable to the union, and, inter alia, that the terms and conditions of the industrial agreement (if registered, of course) are to be explained by the employer to all new employees before the commencement of their employment, as being a condition of employment.

157 In the pro forma letter referred to above, the CFMEU then says quite clearly:-

"For the avoidance of doubt, the CFMEUW will waive its right to seek a Bargaining Agents Fee from its financial members. This fact should be made clear to any employees potentially affected."

158 Of course, by s96B(1) of *the Act*, an industrial agreement must not, inter alia (see 96B(1)(a)(iv)), require a person to treat another person less favourably or more favourably according to whether or not that other person is, or will become or cease to be a member of an organisation. A requirement that is contrary to s96B(1) is of no effect (see s96B(3)).

159 However, on a fair reading, the clause itself, which refers to "employees" and makes no distinction between union members and other employees, is not at all exceptionable. It does not require any person to treat any person less favourably or more favourably according to whether or not that other person is or will become or cease to be a member of an organisation. That, therefore, is not part of the industrial agreement sought to be registered.

160 It is the policy of the union by which financial union members' bargaining agent's fees are waived and which is not part of the agreement which alone might, on a fair reading of the policy, and on the finding of any relevant facts required to be made, be characterised as offending s96B. That, however, is not a part of "an award, order or industrial agreement" within the meaning of s96B(1).

161 An "industrial agreement", as defined in s7 of *the Act*, means "an agreement registered by the Commission under this Act as an industrial agreement". The agreement sought to be registered contains the clause to which we have referred.

- 162 The policy of the CFMEU is not expressed to be part of the industrial agreement sought to be registered, and nothing like it appears in the industrial agreement sought to be registered. Further, it is not part of an award or order as defined. Whether it is “an arrangement between persons relating to employment” within the meaning of s96B(1) is entirely another matter, and irrelevant to these proceedings.
- 163 Further, it is arguable, even if we were wrong in those conclusions, which we are not, that the policy is not one which treats non-union employees less favourably and union employees more favourably merely because a bargaining fee is levied on non-union members and not on union members. In determining that question, which is not a question which is before the Full Bench, much would depend on the quantum of the comparative union fees and bargaining agent’s fees. We do not see that the charging of a fee for a service which is performed for an employee, itself, offends the section. Again, however, it is unnecessary for us to find that, and there are no facts on which we can find it, even if it were relevant.
- 164 There were, in any event, no findings of fact made at first instance in relation to these matters, as we have observed. Some difficulty arises obviously because the interveners’ submissions, supported on this point by other parties, were not ventilated at first instance for the relevant facts to be found by the Chief Commissioner.
- 165 Moreover, even on a fair reading of s41, questions about whether there can be registration of an agreement under s41A do not give any consideration to the operation of s96B of *the Act*.
- 166 Any argument that s96C is an obstacle to negotiation of the agreement fails also because of the lack of fact finding, by agreement of the parties in relation to any question of favourable or less favourable treatment of any person and for the same reasons in that context, as we have expressed in relation to s96B above. We emphasise that the answers which we provide to the questions asked are confined to the direct questions of law posed to the Full Bench.
- 167 We would answer the question posed, “Yes”, on the submissions and material before the Full Bench.

**IS THE PROPOSED SUB-CONTRACTOR’S CLAUSE REGISTERABLE?**

- 168 It was submitted for the intervener that if the intention of the parties was to confine permitted industrial agreements to agreements certified under *the WR Act* or registered under s41 of *the Act*, then the clause has the potential to lead to contraventions of Part XA of *the WR Act*. This, it was submitted, was because Sanwell would be prevented from entering into a sub-contract agreement with a contractor if that sub-contractor had engaged employees under an award or under industrial employment instruments such as a federal AWA or an EEA under *the Act*.
- 169 The question of registerability is confined to the operation of s41A. Again, it is not clear to us which part of s41A applies. No or no sufficient findings of fact have been made, in any event, to enable us to answer that question of law. It is certainly not clear to us either what the submissions of the intervener about the effect of the federal legislation have to do with s41A. In fact, they would seem not to have any relevance. These again are matters which should have been raised at first instance by the intervener, and they have not been. Were they raised at first instance, they might well have been included in the questions referred by the Chief Commissioner. Further, again, no findings of fact, not surprisingly, were made which might relate to any of these matters.
- 170 Accordingly, this question cannot and should not be dealt with by the Full Bench.
- 171 We should say that, fatally for the submission, there is not even a finding of fact at first instance that Sanwell is a constitutional corporation, a major fact on which the intervener bases its submissions. Accordingly, without findings of fact on precise matters pertaining to s41A, there is nothing which can persuade us that the agreement is not registerable under s41A of *the Act*, and we would answer that question “Yes”.
- 172 We were referred to s298K(2) of *the WR Act* which reads as follows, in its relevant part:-
- “(2) A person must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
- (a) ...
- (b) injure the independent contractor in relation to the terms and conditions of the contract for services;
- (c) alter the position of the independent contractor to the independent contractor’s prejudice;
- (d) refuse to engage another person as an independent contractor;
- (e) discriminate against another person in the terms or conditions on which the person offers to engage the other person as an independent contractor.”
- 173 S298L(1) of *the WR Act* deals with prohibited reasons. Conduct referred to in s298K(1) or (2) is for a prohibited reason if it is carried out because the employee, independent contractor or other person concerned, in the case of an independent contractor, has one or more employees who are not or do not propose to become members of an industrial association or has not paid or does not propose to pay a fee however described to an industrial association.
- 174 It is not the fact that Sanwell is a constitutional corporation to which Part XA of *the WR Act* applies by virtue of s298G and it was not so found at first instance, so that matter is not to be taken into account. However, the proposed provision, it was submitted, would require Sanwell to refuse to enter into an agreement with a sub-contractor if that sub-contractor had engaged employees on an award but not a certified agreement or industrial agreement, or if the sub-contractor had engaged employees on individual employer/employee instruments, that is AWA’s or EEA’s.
- 175 It was submitted that, having regard to s298U of *the WR Act*, and consistent with s6(g) of *the Act*, the Commission ought not to permit registration of an agreement under s41 of *the Act* which can lead to breaches of industrial laws of the Commonwealth.
- 176 S298J of *the WR Act* reads as follows:-
- “Subject to section 298W, to the extent that this Part applies by virtue of the operation of section 298G or 298H, it is not intended to exclude or limit the concurrent operation of any law of a State or Territory.”
- 177 An “industrial instrument” is defined in s298B of *the WR Act* as follows:-
- “**industrial instrument** means an award or agreement, however designated, that:
- (a) is made under or recognised by an industrial law; and
- (b) concerns the relationship between an employer and the employer’s employees, or provides for the prevention or settlement of a dispute between an employer and the employer’s employees.”
- 178 “Industrial law” is defined under the same section and means:-
- “**industrial law** means this Act, the Registration and Accountability of Organisations Schedule or a law, however designated, of the Commonwealth or of a State or Territory that regulates the relationships between employers and employees or provides for the prevention or settlement of disputes between employers and employees.”

- 179 We are not of opinion that *the WR Act* purports to bind this State in its legislation. There is no bar established to the registration of the agreement, save and except the question of whether the agreement can enable a person to act as a bargaining agent under *the Act* or *the WR Act* for any purpose other than the narrow purposes and requirements of those Acts, as we have already observed.
- 180 It was submitted, and we agree, that s298K(2)(d) of *the WR Act* does not apply.
- 181 The sub-contractor's clause does not in any way concern itself with what the entitlements of the employees of the sub-contractors are at that time. If they are entitled to the benefit of, for example, an award then the clause says nothing of that. It simply seeks to provide for terms and conditions above that award. In our opinion, too, s298L(1)(h) is directed to a situation where an employee may be entitled to the benefit of a certified agreement, for example, paying above award conditions. If a person refused to engage that person because they were too expensive then that might fall foul of the provision. However, the fact that a person is entitled under an industrial instrument is not any reason for refusing to engage them. In fact, all that it requires is that the sub-contractor enter into a certified agreement or an industrial agreement. If the sub-contractor happens to employ people that are under AWA's or EEA's, then there is no prohibition upon that. People can go ahead and sign individual agreements. All the clause is directed to is that the sub-contractor enter into an industrial agreement or certified agreement. In fact, all of the employees may be so bound by individual agreements, and the sub-contractor could still enter into an industrial agreement which may apply to future employees.
- 182 That, it was said, and we agree, is manifested in s6(ae) of *the Act*, which requires that a principal object of *the Act* is to ensure that all agreements registered under *the Act* provide for fair terms and conditions of employment.
- 183 Next, it was submitted for the Minister that the provision may be unfair because there is no element of consent in relation to a bargaining agent's fee. It was submitted for the CFMEU that that was not unfair because *the Act* provides that once an agreement was made between an employer and a union, then it binds employees. That is not a matter for determination in these proceedings. It is not a question of law but of discretion.
- 184 In our opinion, therefore, it has not been established that those matters are a bar to the registration of the agreement.
- 185 In any event, and fatally, the submission by the Minister is entirely irrelevant to the effect of s41A of *the Act*, and should not be considered for that reason.

#### **THE IMPUGNED SICK LEAVE PROVISION**

- 186 Clause 10(1)(e) relevantly provides, the Full Bench was informed, as follows:-
- “The employee may elect to convert all sick leave entitlements over five days to a cash payment. If the employee elects to convert sick leave to a cash payment, payment must be made by the employer to the employee in the last pay period prior to any close down for Christmas.”
- 187 The effect of the provision is to allow employees who have not used accrued sick leave to entitlements over five days to receive a cash benefit for the Christmas period. The provision has been included in agreements in an attempt to reduce absenteeism through the provision of a monetary incentive.
- 188 The relevant provision is s19 of the *Minimum Conditions of Employment Act 1993* (hereinafter called “*the MCE Act*”) which reads as follows:-
- “19. Paid sick leave, entitlement to**
- (1) Subject to sections 20 and 22, an employee, other than a casual employee, who is unable to work as a result of the employee's illness or injury, is entitled to paid leave each year for periods of absence from work resulting from the illness or injury for the number of hours the employee is required ordinarily to work in a 2 week period during that year, up to 76 hours.
- (2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis.
- (3) In subsection (1), “**year**” does not include any period of unpaid leave.”
- 189 S20A and s21 of *the MCE Act* are also relevant, and read as follows:-

**“20A. Sick leave, employee may use portion of to care for sick relative etc.**

- (1) An employee is entitled to use, each year, up to 5 days of the employee's entitlement under section 19(1) for that year to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of immediate care and attention.
- (2) In subsection (1) —
- “member of the employee's family”** means any of the following persons —
- (a) the employee's spouse or de facto partner;
- (b) a child for whom the employee has parental responsibility as defined by the *Family Court Act 1997*;
- (c) an adult child of the employee;
- (d) a parent, sibling or grandparent of the employee.

**21. Certain matters as to sick leave not minimum conditions**

Nothing in this Division requires —

- (a) an employee's untaken entitlement under section 19(1) or 20A(1) to be carried over from the year in which the entitlement arose to the next year;
- (b) an entitlement under section 19(1) or 20A(1) to be taken as a whole working day; or
- (c) an employer to pay an employee in lieu of the employee's untaken entitlement under section 19(1), on the termination of the employee's employment.”

- 190 The sick leave provisions provided for under the agreement comply with the minimum statutory requirements prescribed by s19 and s20A of *the MCE Act*.
- 191 Additionally, the sick leave benefits provided for under the agreement and the award have been enhanced by the provision of sickness, accident and income protection insurance provided for under clause 32 of the agreement. We agree with that submission, on a fair reading of the section. It was not argued otherwise.

- 192 The payout of accrued sick leave under clause 10(1)(e) does not offend the provisions of *the MCE Act* because minimum entitlements provided for under *the MCE Act* do not by virtue of s21 carry over from year to year. Alternatively, we are not satisfied on the facts and a fair reading that it does.
- 193 However, again, we are not certain what part of s41A is material, nor are there any relevant findings of fact. However, in its terms, and in the absence of facts or arguments which would lead to another conclusion, there is no obstacle to the registration of the agreement, including that clause. We would find accordingly.

**ANSWERS TO THE QUESTIONS POSED**

194 We would therefore answer the questions posed to the Full Bench as follows:-

- (a) Question (a) –
  - (i) Yes
  - (ii) Yes
- (b) Question (b) –
  - (i) Yes
  - (ii) Yes
- (c) Question (c) – Yes

**COMMISSIONER J H SMITH:**

195 The questions of law formulated for the reference to the Full Bench are set out in the President's reasons for decision.

196 The Minister for Employment and Workplace Relations was granted leave to intervene in this matter. The reasons given by the President set out the reasons why I was satisfied leave should be granted.

**Does the Bargaining Agent's Fee Raise an Industrial Matter**

197 The CFMEU argues that recent amendments to the definition of "industrial matter" in s 7 of the *Industrial Relations Act 1979*, by the enactment of the *Labour Relations Reform Act 2002*, has expanded and broadened the jurisdiction of the Commission. Relevantly, s 7 of the Act was amended as follows to define an "industrial matter" to mean among other things:-

"any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes ~~any matter relating~~ matter affecting or relating or pertaining to —

- (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
- (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
- (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
- ~~(ca) the relationship between employers and employees;~~
- (d) any established custom or usage of any industry, either generally or in the particular locality affected;
- (e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;
- (f) in respect of apprentices or ~~industrial trainees~~ trainees —
  - (i) their wage rates; and
  - (ii) subject to the *Industrial Training Act 1975* —
    - (I) their other conditions of employment; and
    - (II) the rights, duties, and liabilities of the parties to any agreement of apprenticeship or ~~industrial training agreement~~ training agreement;
- ~~(g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —~~
  - ~~(i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or~~
  - ~~(ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;~~
- ~~[(h) deleted]~~
- (i) any matter, whether falling within the preceding part of this interpretation or not, where —
  - (i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and
  - (ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —
- (j) compulsion to join an organisation of employees to obtain or hold employment;
- (k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organisation of employees;
- (l) non-employment by reason of being or not being a member of an organisation of employees; or
- (m) any matter relating to the matters described in paragraph (j), (k) or (l);"

198 Not all conflicts and causes of action between master and servant are industrial matters. For a matter to constitute an industrial matter, the matter must be of an industrial nature (*Hotcopper Australia Ltd v Saab* ("Saab's case") [2002] WASCA 190 at [26]-[27]; (2002) 82 WAIG 2020 at 2023. See also *Robe River Iron Associates v The Metal & Engineering Workers' Union*

*Western Australian Branch* (1995) 75 WAIG 2478 and *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia* (Pepler's case) (1987) 68 WAIG 11).

- 199 The enactment of the *Labour Relations Reform Act* added the words "or pertaining" in line two and added "matter affecting or relating or pertaining" in lines 5 and 6 of the opening words. Further, subsections (ca) and (g) were added and the words "and also includes any industrial matter of an industrial nature the subject of an industrial dispute or the subject of an industrial dispute of the subject of a situation that may give rise to an industrial dispute" were added to the concluding paragraph of the definition.
- 200 As to the addition of the words "or pertaining" and subsection (ca) the observations made by the Industrial Appeal Court in *The Minister of Police and The Commissioner of Police v Western Australian Police Union of Workers* (1995) 75 WAIG 1504 are in my respectful view relevant in construing these amendments. In that case, the Industrial Appeal Court had regard to s 4 of the *Commonwealth Conciliation and Arbitration Act 1909*, which defined "industrial matters" as meaning "all matters pertaining to the relations of employers and employees" and without limiting the generality of these words included certain matters. Franklyn J, with whom Kennedy and Rowland JJ agreed, compared scope of the definition of "industrial matters" in the Commonwealth Act to the definition of "industrial matter" in the *Industrial Relations Act*. At page 1508 Franklyn J said:
- "In my opinion, the general words of the definition "industrial matter" in s 7 of the Act provide a definition considerably wider in its coverage than that of "industrial matters" in the Commonwealth Act. Unlike the Commonwealth definition, its terms are not directed initially to the question whether the matter in issue "pertains" (ie belongs to or is within the sphere of) the relations of employers and employees as such. Rather, it is directed to the question whether the matter in issue affects or relates to the work, privileges, rights or duties of employers or employees or an employer or employee in any industry. It seems to me that this requires initial identification of what it is, within the description of "work, privilege, rights or duties" of the employer or employee or employers or employees (as the case may require), that is said to be affected by or related to the claimed industrial matter. If that cannot be identified, then the issue does not concern an industrial matter. If, however, it can be identified, then the inquiry is next directed to establishing whether the matter in issue does, as a matter of fact, affect or relate to the identified "work, privilege, right or duty". Only if it can be found so to do can it be an "industrial matter" within the meaning of the Act. In my opinion, to approach the question in reliance on authorities based on the definition in the Commonwealth Act is to distract from the true question. Whilst it is implicit in the wording of the definition in s 7 that the "matter" must be connected with the relationship between the employer and employee in their respective capacities as such, to determine the issue on the further requirement expressed in the *Manufacturing Grocers Employees* case that the matter must not only be so connected, but must also be "direct and not merely consequential", diverts from the necessity of determining whether the matter in fact affects or relates to the identified work, privilege, right or duty. The test in the *Manufacturing Grocers Employees* case concentrates on the nature and degree of the "connection" between the "matter" and the employer and employee relationship rather than the test provided for by the definition in s 7."
- 201 In oral submissions the CFMEU's counsel informed the Full Bench that the CFMEU relies upon subsections (a), (b), (e) and (i).
- 202 With respect I am of the view the addition of the words "or pertaining" by Parliament has added an alternative test of determining whether an "industrial matter" is raised by a matter in issue. As his Honour Franklyn J points out, this test is different than the test already provided for in the opening paragraph of "industrial matter". When the test enunciated by Franklyn J is applied to a matter in issue, the Commission is required to identify the relevant part of the definition of industrial matter and determine whether the matter in dispute is affected or related to that part. However, Parliament has also added the words "affecting or relating to or pertaining to" in line 6 of the opening paragraph of definition of industrial matter to qualify the matters set out in paragraphs (a) to (e). These words replaced the words "matter relating". As words "affecting or pertaining to" in line 6 have been added, the Commission when considering these words is required to consider whether the matters in dispute between the parties are directly connected with the matters set out in the opening paragraph and subclauses (a) to (i) of the definition of "industrial matter". This in my view is a different and separate test to the test enunciated by Franklyn J.
- 203 Having considered the terms of the proposed Bargaining Agent's Fee clause, I am of the view that the clause raises a matter that is of an industrial nature. Paragraph (iii) of the Bargaining Agent's Fee clause on its face raises a matter affecting or relating to the wages, salaries, allowances, or other remuneration of employees within the meaning of subparagraph (a) of s 7, as the deduction of the Bargaining Agent's Fee is a deduction from an employee's wage, salary allowances or other remuneration. Further, the whole of the clause in my view constitutes a condition of employment within the meaning of subsection (b) of s 7. That is not, however the end of the inquiry, as the Saab's case illustrates not all conditions of employment have an industrial relations complexion. In Saab's case, Mr Saab sought an order from the Commission for the issue and transfer of shares pursuant to the terms of his contract of employment. The Industrial Appeal Court held Mr Saab's claim was a private claim of a commercial nature which lacked any ingredient or complexion of industrial relations. In this matter the clause and the agreed facts disclose the employees of Sanwell Pty Ltd (except members of the CFMEU) are required to pay the union a bargaining agent's fee. Whilst it is not clear what the fee is for, the title of the clause suggests it may be for work undertaken by the union in negotiating an industrial agreement. Under the Act an organisation of employees is not confined to representing its members. It can act on behalf of persons eligible to be members by negotiating an agreement on behalf of members or those eligible to be members (See s 41A(2)). Further, the process of collective bargaining engaged in by an organisation on behalf of an entire group of employees is embraced by the principal objects of the Act set out in s 6(ad). For these reasons I am of the view that the Bargaining Agent's Fee clause raises an "industrial matter" within the meaning of s 7 of the Act. If I am wrong, whilst the CFMEU and Sanwell Pty Ltd could rely upon subsection (i) of the definition of "industrial matter" to do so they would have to agree that it is desirable that the Bargaining Agent's Fee clause be dealt with as an "industrial matter". I do not agree that by entering into an agreement which is intended by the parties to be registered as an industrial agreement that the parties can be said to have given their agreement that it is desirable that each matter in the agreement be dealt with as if they were an "industrial matter". However it is open to parties to reach such an agreement and once agreement is reached the Commission is then required to determine whether the objects of the Act would be furthered if the matter were dealt with as an "industrial matter".
- 204 If the Bargaining Agent's Fee clause does not raise an "industrial matter", the CFMEU argues that the Commission can register an agreement that contains provisions which are not "industrial matters". In particular, CFMEU says under s 41(1) the Commission may register an agreement for the prevention or resolution of under the Act of disputes, disagreements, or questions relating thereto. They also contend the Commission should examine the agreement as a whole in making a determination whether the agreement is "with respect to any industrial matter" (see *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited* [2002] FCAFC 199 at [102]; (2002) 118 FCR

177 at 196). For the reasons set out above I do not need to deal with this argument in relation to the Bargaining Agent's Fee as I have reached the conclusion the Bargaining Agent's Fee clause does raise an "industrial matter".

**Can the Commission Register the Agreement with the Bargaining Agent's Fee Clause under s 41 of the Act**

205 The Minister for Employment and Workplace Relations, whose submissions were adopted by Sanwell Pty Ltd and the Chamber of Commerce and Industry, say that the Bargaining Agent's Fee clause and policy of CFMEU to waive its right to seek the fee from its financial members is a prohibited arrangement within the meaning of s 96B(1)(b) of the Act. I agree with His Honour the President for the reasons he gives that the Bargaining Agent's Fee is not a prohibited arrangement within the meaning s 96B(1)(b).

206 Sanwell Pty Ltd also argues that the Bargaining Agent's Fee clause and policy of CFMEU breaches s 96C of the Act. However, on the facts before the Full Bench there is nothing before it on which it could be affirmatively be said that the policy of the CFMEU is in breach of s 96C. Section 96C provides:

- "(1) A person must not, in relation to any contract of employment or contract for services, treat another person less favourably or more favourably according to whether or not the person is, or will become or cease to be, a member or officer of an organisation.
- (2) A person must not conspire with another person to commit an offence against subsection (1).
- (3) It is not an offence against subsection (1) for a person to treat another person more favourably as part of a scheme whereby the cost of services provided to members of an organisation is less than the cost ordinarily charged by the person for those services."

207 Section 96C(3) expressly contemplates that an employee organisation may provide services to members at a discounted rate. This does not mean that the application of the policy could not in some circumstances breach s 96C. That is not however a matter on which this Full bench can speculate.

208 As the policy does not form part of terms of the agreement, I agree the Commission can register the agreement containing the Bargaining Agent's Fee Clause.

**Does the Engagement of Sub-contractor's Clause Raise an Industrial Matter**

209 The proposed clause prohibits the CFMEU from engaging any sub-contractor who has not executed a certified agreement or industrial agreement. The CFMEU contends that the clause is born out of a dispute as to the terms and conditions upon which sub-contractors employ their labour and is intended to provide for above award terms and conditions of employment for employees of sub-contractors.

210 Whilst the Minister says that the use of sub-contractors may fall within the definition of "industrial matter" as the use of sub-contractors may deleteriously affect the amount of work available for employees to perform, this clause does not directly prohibit the engagement of a sub-contractor. The Minister says that the terms and conditions of the employer's relationship with sub-contractors engaged by it are an aspect of the commercial relationship between Sanwell Pty Ltd and the sub-contractor and do not affect, relate or pertain to the employment relationship between the Sanwell Pty Ltd and its employees.

211 In *R v Commonwealth Industrial Court Judges; Ex parte Cocks* ("Cocks' case") (1968) 121 CLR 313, the Commonwealth Industrial Court made an award containing a clause prohibiting an employer bound by the award to cause any work to be done for him by any person outside his workshop or factory unless the person is the holder of a current outdoor worker's permit. The High Court held a dispute as to whether outworkers (contractors) should be engaged is not "industrial". In *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 9 ("Moore's case"), the union served a letter of demand on a number of uranium mining companies and project engineers. Clause 5 of the letter demanded that no employer shall permit a contractor to pay their employees except in accordance with the terms of the proposed award. The clause also demanded the employer to enter into binding agreements with contractors to pay the rates and observe the conditions prescribed in the proposed award. Jacobs J, with whom Stephen J agreed, at page 478 distinguished Cocks' case and held:-

"... the presence of a claim in a log of claims, even if it be one which does not involve an industrial matter, does not provide a reason for the grant of prohibition or certiorari. That is sufficient to dispose of the argument based on cl. 5. But it cannot be assumed that under no circumstances could the insertion of such a clause in an award settle a dispute as to an industrial matter. Here the evidence shows that the construction works will be large and extensive. It cannot be assumed that the respondent companies - both the mining and the project companies - will not be exercising continued supervision and co-ordination. It may well be that if the Commission considered it proper in order to achieve a settlement of existing or threatened disputes between the companies and their employees that the same award conditions should apply throughout the work of constructing the mines and their associated installations, it would be open to it to achieve that result by the insertion in the award of a clause along the lines of cl. 5."

212 Gibbs J agreed with Jacobs J and observed that this question should not be finally determined until the facts were fully explored. Gibbs J also distinguished Cocks' case and observed that the present dispute is not whether contractors should be engaged but whether, if they are engaged, their employees should be entitled to the benefits of the proposed award, assuming one is made.

213 In *R v Industrial Commission of South Australia; Ex parte Master Builders Association of South Australia Incorporated* [1981] 26 SASR 535 ("Master Builders' case"), the South Australian Supreme Court accepted that the South Australian Commission has jurisdiction to include in an award made by it provisions prescribing conditions upon which employers bound by the award may engage independent contractors to do work covered by the award. But it determined that the power was not at large. The Court held that provisions which are designed to prevent an employer from procuring work which would otherwise be performed by employees under the award, to be done by sub-contractors for contract prices and under contract conditions less favourable to those performing the work than those prescribed by the award, affect or relate to the employer and employee relationship in a close and obvious way (per King CJ at 538). The Court then went on to consider three clauses sought by the union. One was found to be within jurisdiction. The other two were found not to raise an "industrial matter". These clauses were as follows:-

"Clause 42 A person (hereinafter referred to as the 'principal') shall not enter into a contract or arrangement with any other person (hereinafter referred to as the 'contractor') for the supply of labour of a kind mentioned in clause 4 of this award unless such principal's contract or arrangement with such contractor contains clauses or agreements in respect of such labour binding the principal to observe not less than the rates of pay, industrial conditions and requirements as set out in this award.

- Clause 43 An employer bound by this award (hereinafter referred to as the 'principal') shall not enter into a contract with any other person (hereinafter referred to as the 'contractor') for the contractor to undertake work of a kind mentioned in clause 4 of this award unless such principal's contract with such contractor contains clauses or agreements in respect of such work binding the principal to observe not less than the rates of pay, industrial conditions and requirements as set out in this award.
- Clause 44 No person (hereinafter referred to as 'the principal') shall enter into any contract for the carrying on of any work of a kind mentioned in clause 4 of this award with any other person (hereinafter referred to as 'the contractor') unless such principal's contract with such contractor contains clauses:
- (i) binding the contractor to pay his employees not less than the rates and to observe the conditions set out in this award in respect of such work;
  - (ii) entitling the principal to terminate the contract in the event of failure by the contractor to pay not less than such rates or observe such conditions; and
- binding the principal to assume responsibility to the extent of any moneys due by him to the contractor for the payment of all wages due by the contractor to employees for such work."

214 At 539, King CJ, with whom Mohr J agreed, held that proposed Clauses 42 and 44 were beyond power. His Honour determined that:-

"Clause 42, like Clause 43, deals with a contract whereby the contractor performs the work personally, but, unlike Clause 43, it places the obligation on the principal whether he is or is not an employer bound by the award. I do not think that the insertion of a clause in the award in terms of such width would be within jurisdiction. It would cover situations quite remote from any actual or potential employer and employee relationship. The principal might be a householder who contracts for a lump sum for plastering work to be done on his home with materials supplied by the householder. Such a situation cannot be said, in my opinion, to be sufficiently connected with the relationship of employer and employee to be regarded as related to an industrial matter. If, however, the principal is in business in the industry and would, but for such contracts, be likely to employ labour in accordance with the award, there would, in my opinion, be sufficient connection, and a determination inserting in the award a proper clause covering that situation would be within jurisdiction. There may be other situations which would lawfully be covered by such a clause.

The proposed Clause 44 deals with the situation in which the principal contracts with a contractor who will himself employ labour. The comments which I made as to the width of the expression "the principal" in relation to Clause 42 and the limits within which there may be jurisdiction, apply with equal force to this clause."

- 215 In this matter, similar observations can be made about the sub-contractor's clause. Firstly, it binds Sanwell Pty Ltd even when it seeks to engage a sub-contractor who is not an employer. Such an all encompassing obligation cannot, in my opinion, be a matter affecting or relating to or pertaining to the work privileges, rights or duties of Sanwell Pty Ltd or its employees or any matter set out in subsections (a) to (g) of the definition of "industrial matter". If Sanwell Pty Ltd engages a sub-contractor to provide secretarial services on site, the proposed clause would apply despite the fact the CFMEU has no constitutional coverage of secretaries. If this work is contracted out, Sanwell Pty Ltd would be bound to comply with the clause unless there is a provision in the agreement that confines the operation of the sub-contractor clause to particular sites and or groups of employees in relation to which the CFMEU has constitutional coverage.
- 216 In my opinion, the terms of proposed sub-contractor's clause are so wide so as to not constitute an "industrial matter" under s 7. Having reached that conclusion the clause could be capable of being dealt as if it were an industrial matter by agreement between the CFMEU and Sanwell Pty Ltd or being dealt with as a "matter of an industrial nature the subject of an industrial dispute" or "the subject of a situation that may give rise to an industrial dispute" within the meaning of s 7. However, there are no facts before the Full Bench upon which either conclusion could be drawn, so as to invoke subsection (i) or the concluding paragraph to the definition of "industrial matter". Leaving that aside, it is plainly apparent from the terms of the clause, that the provision is not a demand to pay the same terms and conditions paid to employees of Sanwell Pty Ltd. The clause regulates the contract between Sanwell Pty Ltd and the contractor and not employees of Sanwell Pty Ltd. Further, on its face, the clause is not site specific, nor is it confined to apply to persons who are members or eligible to be members of the CFMEU. If however the clause was amended to restrict the operation of the clause in such a way then the provision could, depending upon the terms of the amendment, be capable of raising an "industrial matter". Further if any facts are raised before the Commission at first instance which provide a basis to form an opinion that this clause arose out of a "matter of an industrial nature the subject of a situation that may give rise to an industrial dispute" it would be open to conclude that the sub-contractor's clause raises an industrial matter within s 7.
- 217 I do not agree that the observations made by the Full Bench in *Hanssen Pty Ltd v CFMEU* (unreported) [2004] WAIG 10828 ("the Hanssen case") in respect an identical sub-contractor's clause. This matter was argued before the Hanssen case was decided and these reasons were written in draft form prior to the delivery of the Hanssen decision.
- 218 The Full Bench should not lightly depart from its earlier decisions and that is particularly so when the earlier decision has been applied. It should do so only in circumstances in which it is convinced that the earlier decision is wrong (see *Re Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343 per Steyler at 354). In Hanssen the Full Bench upheld the appeal by Hanssen and quashed the order at first instance making an enterprise order on grounds that are not relevant to the matters raised in this matter. In that case the Full Bench dismissed a ground of appeal raised by Hanssen that a sub-contractor's clause in the same terms as the clause in this matter was not an "industrial matter". As that ground failed but the appeal was successful on other grounds this issue may not be tested on appeal. At [253], [259], [263] and [264] of the Hanssen case the Full Bench applied the reasons of King CJ in the Master Builders' case (op cit) and observed in particular at [263] and [264] that the sub-contractors clause is similar to and very little removed in type to the clause considered in Moore's case (op cit) and Master Builders' case (op cit). This observation in my respectful opinion is not right. The provision considered in Moore's case was a clause in a letter of demand and not a clause in an award or registered agreement. The majority of the High Court in Moore's case held the clause in the letter of demand may be capable of raising an industrial matter, not that it raised an industrial matter. Further the area and scope of the demand in that case was defined by the terms of the proposed award. The clause was different from the clause in this matter in that the clause in Moore's case sought to bind a contractor to the conditions contained in the proposed award. Similarly the sub-contractor's clause in this matter is not of the kind found within jurisdiction in the Master Builders' case. Clause 43 was the only clause found to be within power in the Master Builders' case. Clause 43 bound the principal when contracting with a sub-contractor to provide work of a kind set out in the award to observe rates and conditions not less than the rates of pay, industrial conditions and requirements as set out in the award. By restricting the application of cl 43 to work covered by the award the scope of the clause was restricted not only to the

constitutional coverage of the union and in doing so could be said to affect or relate to the work of the employees who were covered by the award.

- 219 I do not agree that the Commission should examine the agreement as a whole to determine whether the agreement is "with respect to an industrial matter" in this case. Section 41(1) of the Act provides that an "agreement with respect to any industrial matter or for the prevention or resolution of disputes, disagreements, or questions relating thereto may be made". All words "with respect to" require a relevance or connection to the industrial matter or the prevention of resolution of disputes, disagreement or questions relating thereto (see by analogy *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 in relation to the Commonwealth's law making powers). Notwithstanding these words allow the registration of an industrial agreement which contains matters which are peripherally connected with an "industrial matter", the Commission's jurisdiction is not at large. In each case the question must be whether the circumstances of a dispute is really and truly a dispute of an industrial nature, susceptible of resolution under the Act (see Saab's case (op cit) Anderson J at [27]). Disputes capable of resolution between an organisation and an employer must be confined to the constitutional coverage of the organisation in question. Insofar as the sub-contractor's clause extends beyond the CFMEU's constitutional coverage there is not a sufficient connection with an industrial matter or to the prevention or resolution of disputes disagreement or questions within the meaning of s 41(1).

#### **Can the Commission Register the Agreement containing the Engagement of Sub-contractor's Clause**

- 220 Where the parties reach an agreement within the meaning of subsection (i) of the definition of "industrial matter" the Commission is then required to consider whether the objects of the Act would be furthered if the matter is dealt with as an "industrial matter".
- 221 No party made any submissions about the objects of the Act, however the Minister contends that if the agreement is registered the proposed sub-contractor's clause would breach s 298K(2) of the *Workplace Relations Act 1996*. These provisions apply to Sanwell Pty Ltd as they are a constitutional corporation (see s 298G of the *Workplace Relations Act*). Section 298K(2)(d) provides:-

"A person must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

(d) refuse to engage another person as an independent contractor;"

- 222 The "prohibited reason" relied upon is defined in s 298L(1)(h) as:-

"Conduct referred to in subsection 298K(1) or (2) is for a *prohibited reason* if it is carried out because the employee, independent contractor or other person concerned:

(h) is entitled to the benefit of an industrial instrument or order of an industrial body;"

- 223 An "industrial instrument" defined in s 298B to include instruments made under the *Workplace Relations Act* and the Act.

"*Industrial instrument* means an award or agreement, however designated, that:

(a) is made under or recognised by an industrial law; and

(b) concerns the relationship between an employer and the employer's employees, or provides for the prevention or settlement of a dispute between an employer and the employer's employees."

- 224 In my respectful opinion, s 298K(2) is not raised by the proposed sub-contractor's clause. The clause does not require Sanwell Pty Ltd to refuse to engage a sub-contractor if they are entitled to the benefit of a Federal or State award or a certified agreement on industrial agreement. The clause creates an obverse obligation. However, for the reasons set out above under the heading "Does the Engagement of Sub-contractor's Clause Raise an "Industrial Matter", I am of the view the Commission cannot register the agreement containing this clause.

#### **Conversion of Sick Leave**

- 225 Sanwell Pty Ltd questions whether the provisions of the *Minimum Conditions of Employment Act 1993*, prohibit the payout of sick leave.
- 226 Pursuant to s 19(1) of the *Minimum Conditions of Employment Act* all full-time employees are entitled to 10 days paid sick leave per year. Whilst s 19(1) contemplates the taking of leave, Division 2 of Part 4 of the *Minimum Conditions of Employment Act* does not deal with accrual of sick leave from year to year. If a full-time employee takes only one day of sick leave shortly before the end of that year, they would have an entitlement to nine days sick leave. Under the *Minimum Conditions of Employment Act*, those nine days do not accrue to the next year. However, the *Minimum Conditions of Employment Act* only creates minimum conditions. If it is intended that the nine days entitlement, standing as accrued within that year, should be paid out rather than lapse at the end of the year, then in my view the operation of s 19(1) would not be affected. Having made these observations the clause does not clearly evince that intention. If that is the intention all full-time employees would have commenced employment on 1 January in any year. If it is intended that election and payment can only be made to take effect on or after the last pay period of a year's service the clause is capable of amendment pursuant to s 41(3) of the Act.

#### **Answers to the Questions Posed**

- 227 I would therefore answer the questions posed to the Full Bench as follows:-

- |      |              |
|------|--------------|
| (a)  | Question (a) |
| (i)  | Yes          |
| (ii) | Yes          |
| (b)  | Question (b) |
| (i)  | No           |
| (ii) | No           |
| (c)  | Question (c) |
|      | Yes          |

#### **THE PRESIDENT:**

- 228 For those reasons, the answers to the questions of law referred to the Full Bench pursuant to s27(1)(u) of the Act are as set out in paragraph 194 above.

2004 WAIRC 11088

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	<b>APPLICANT</b>
	<b>-and-</b>	
	SANWELL PTY LTD AND THE CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA	<b>RESPONDENTS</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER J F GREGOR COMMISSIONER J H SMITH	
<b>DELIVERED</b>	Wednesday, 7 April 2004	
<b>FILE NO/S</b>	FBM 8 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11088	

<b>Catchwords</b>	Industrial Law (WA) – Speaking to the minutes – Right of intervener to speak to the minutes – <i>Industrial Relations Act 1979</i> (as amended), s30, s35
<b>Decision:</b>	Determination issued without amendment
<b>Appearances</b>	
<b>Applicant</b>	Mr T R Kucera (of Counsel), by leave
<b>Respondent</b>	Mr K Richardson, as agent, on behalf of Sanwell Pty Ltd
<b>Intervenor</b>	Mr D S Ellis (of Counsel), by leave, and with him Ms Z M Weir (of Counsel), by leave

*Supplementary Reasons for Decision*

**THE PRESIDENT:**

- 1 This matter came on for a speaking to the minutes on Thursday, 1 April 2004 at the request of the respondent, Sanwell Pty Ltd. Put shortly, Sanwell Pty Ltd submitted that the answers provided by the Full Bench to the questions referred to it by the Chief Commissioner should be expanded.
- 2 However, a question arose whether The Honourable, the Minister for Employment and Workplace Relations, who was given leave to intervene in these proceedings pursuant to s30 of *the Industrial Relations Act 1979* (as amended) (hereinafter called "*the Act*"), could be heard upon a speaking to the minutes.
- 3 The Full Bench had referred the parties and the intervener to the leading authority in this jurisdiction on that point, namely *Australian Bank Employees Union v Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch and Others* (1990) 70 WAIG 2086 at 2091 (IAC) per Brinsden J (Kennedy J agreeing). The Full Bench has followed and applied that decision for a number years. The relevant part of the reasons appears at page 2091 and I quote it in full hereunder:-  

"Furthermore, I do not believe an intervener is a person included in the phrase "the parties concerned". That phrase refers to those parties who will be concerned in the order of the Commission as finally drawn up and made. In this case those persons were the respondents. Sections 27(1)(k), 27(1)(j), 29B, 31, 33(5) and 90(2)(a) throw some light on the meaning of "parties" or "party" as variously used in the Act. Generally speaking interveners are called interveners and "parties" refers to those persons who are applicant and respondent to the particular proceedings. Though it must be confessed the Act is not entirely consistent in this regard, it is sufficiently consistent I think to reach the conclusion that interveners are not contemplated by section 35 as having any right to speak to the minutes unless the intervener has become a party and that was not the case here."
- 4 It therefore follows that the Minister, as an intervener, notwithstanding Mr Ellis' submission to the contrary, has and had no right to be heard on the speaking to the minutes, because such a right is confined under s35 of *the Act* to the parties concerned only. I therefore so hold.
- 5 The submission that, as an intervener, the Minister was entitled to speak to the minutes was therefore rejected by the Full Bench and the application to do so was dismissed. For those reasons, I agreed with my colleagues.
- 6 As to the proposed amendments to the minutes, the submissions of Mr Richardson in support of the amendments which he proposed were rejected by the Full Bench. I was satisfied that, manifestly, the answers which it provided to the questions referred to reflected the reasons for decision of the Full Bench, and adequately answered the questions posed to it. They therefore required no further additional embellishment. I therefore joined my colleagues in deciding to issue the Full Bench's determination without amendment.

**COMMISSIONER J F GREGOR:**

- 7 I have read the reasons for decision of His Honour the President. I agree and have nothing to add.

**COMMISSIONER J H SMITH:**

- 8 I have had the benefit of reading in draft the reasons to be published by the President. I agree with His Honour's reasons and have nothing further to add.

**THE PRESIDENT:**

- 9 For those reasons, the Full Bench decided to issue the determination without amendment.

2004 WAIRC 11017

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS  <b>-and-</b> SANWELL PTY LTD AND THE CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA	<b>APPLICANT</b>  <b>RESPONDENTS</b>
<b>CORAM</b>	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER J F GREGOR COMMISSIONER J H SMITH	
<b>DELIVERED</b>	MONDAY, 22 MARCH 2004	
<b>FILE NO/S</b>	FBM 8 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11017	

<b>Decision</b>	Determination of questions of law pursuant to s27(1)(u) of <i>the Act</i>
<b>Appearances</b>	
<b>Applicant</b>	Mr T J Dixon (of Counsel), by leave and with him Mr T R Kucera (of Counsel), by leave
<b>Respondent</b>	Mr K Richardson, as agent, on behalf of Sanwell Pty Ltd, and Mr K J Dwyer on behalf of The Chamber of Commerce and Industry of Western Australia
<b>Intervener</b>	Mr D S Ellis (of Counsel), by leave, and with him Ms Z M Weir (of Counsel), by leave

*Determination of Questions of Law Pursuant to s.27(1)(u) of the Act*

WHEREAS in this matter the following questions of law were referred to the Full Bench with the consent of the President pursuant to s.27(1)(u) of the *Industrial Relations Act 1979* (as amended) (hereinafter referred to as the "the Act") by Chief Commissioner Coleman :-

- (a) (i) Is the provision of a "Bargaining Agents Fee" in the terms set out hereunder an industrial matter?
- (ii) Where the parties have agreed to the provision for a "Bargaining Agents Fee" in the terms set out hereunder, can the Commission register the Agreement under section 41A of the Act?
- (b) (i) Is the provision of a clause as set out hereunder which prevents the employer engaging any sub-contractor that has not executed a certified agreement or industrial agreement an industrial matter?
- (ii) Where the parties have agreed to the provision of a clause which is set out hereunder which prevents an employer from engaging any sub-contractor that has not executed a certified agreement or industrial agreement can the Commission register the agreement under section 41A of the Act?
- (c) (i) Where the parties have agreed to the provision of a clause which is set out hereunder which enables conversion of accrued sick leave credits to be bought out, can the Commission register the agreement under section 41A of the Act?

AND WHEREAS the matter having come on for hearing and determination before the Full Bench on the 11<sup>th</sup> day of December 2003, and having heard Mr T J Dixon (of Counsel), by leave, and with him Mr T R Kucera (of Counsel), by leave, on behalf of the applicant organisation, and Mr K Richardson, as agent, on behalf of the respondent, and Mr K J Dwyer, on behalf of the Chamber of Commerce and Industry, Western Australia, and Mr D S Ellis (of Counsel), by leave, and with him Ms Z M Weir (of Counsel), by leave, on behalf of The Honourable The Minister for Employment and Workplace Relations (Commonwealth), and the Full Bench having determined that The Honourable The Minister for Employment and Workplace Relations of the Commonwealth of Australia should have leave to intervene pursuant to s.30 of the Act, and the Full Bench having reserved its determination in the matter, and reasons for determination having been delivered on the 22<sup>nd</sup> day of March 2004, and the parties herein having spoken to the minutes of the proposed determination on 1 April 2004, it is this day, the 22<sup>nd</sup> day of March 2004, determined and the Full Bench hereby determines as hereinafter expressed:-

THAT the said questions of law be answered as follows:-

- Question (a) – (i) Yes
- (ii) Yes
- Question (b) – (i) Yes
- (ii) Yes
- Question (c) – (i) Yes

By the Full Bench  
(Sgd.) P J SHARKEY,  
President.

[L.S.]

## COMMISSION IN COURT SESSION—Awards/Agreements— Variation of—

2004 WAIRC 10910

### HOSPITAL SALARIED OFFICERS' AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)

**APPLICANT**

-v-

ROYAL PERTH HOSPITAL AND OTHERS

**RESPONDENTS****CORAM**COMMISSION IN COURT SESSION  
CHIEF COMMISSIONER W S COLEMAN  
SENIOR COMMISSIONER A R BEECH  
COMMISSIONER P E SCOTT**DATE**

THURSDAY, 18 MARCH 2004

**FILE NO/S**

P 39 OF 1997(B)

**CITATION NO.**

2004 WAIRC 10910

**Result**

Application granted in part

*Order*

HAVING heard Mr D Hill and with him Ms C Thomas on behalf of the applicant and Ms C Glenn and with her Mr G Edwards on behalf of the respondents, the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

- (1) That the Hospital Salaried Officers' Award 1968 (No. 39 of 1968) be varied in accordance with the following schedule;
- (2) That the variation shall have effect from the first pay period beginning on or after 1<sup>st</sup> September 2001, in respect of employees employed at that date, or from the date of engagement where such employees commenced employment after 1<sup>st</sup> September 2001 provided that:
  - (a) Clinical Psychologists seeking backdated reclassification above Grade 2 shall make application to the Respondent within four weeks of the date of this Order; and
  - (b) all such applications by Clinical Psychologists for reclassification shall be determined by the Respondent within eight weeks of the date of this Order; and
  - (c) any applications remaining in dispute shall be referred to the Public Service Arbitrator for determination pursuant to section 80E(2)(a) of the *Industrial Relations Act, 1979*.
- (3) With respect to subclause 5(e) in Schedule 1 attached, that provision of this Order is to be reviewed by the Commission in Court Session following six months operation.

(Sgd.) W S COLEMAN,  
Commission In Court Session.

[L.S.]

## SCHEDULE

**1. Schedule A. – Minimum Salaries: Delete Clause (5) of this Schedule and insert the following in lieu thereof:**

- (5) (a) An employee appointed as a Clinical Psychologist Registrar (Grade 1) shall commence at Level 6.1 and shall progress to Level 6.3 in the second year.
- (b) An employee appointed as a Clinical Psychologist (Grade 2) shall commence at Level 7.3 and shall progress by annual increments to Level 9.2.
- (c) Progression from Clinical Psychologist Registrar (Grade 1) to Clinical Psychologist (Grade 2) shall occur with effect from the date registration as a "Clinical Psychologist" is conferred by the Psychologists' Board of Western Australia and the relevant positions may be advertised at Grade 1 or Grade 2 when vacant.
- (d) "Clinical Psychologist (Grade 2)" shall mean a Clinical Psychologist who:
  - (i) is registered with the Psychologists' Board of Western Australia;
  - (ii) has a thorough knowledge of the methods, principles and practices of the profession;
  - (iii) works under general to limited direction; and
  - (iv) has an ability to practice psychology with a high degree of initiative and experience.
- (e) The classification and grading structure for Clinical Psychologists above Grade 2 shall be as agreed from time to time between the Employer and the Union, and shall be published by the Employer in an Operational Circular.

**AWARDS/AGREEMENTS—Application for—**

2004 WAIRC 10982

**WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE MINISTER FOR HEALTH

**APPLICANT**

-v-

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND OTHERS

**RESPONDENTS****CORAM**

COMMISSIONER P E SCOTT

**DATE OF ORDER**

FRIDAY, 26 MARCH 2004

**FILE NO**

A 2 OF 2004

**CITATION NO.**

2004 WAIRC 10982

**Result**

New Award

*Order*  
**A W A R D**

HAVING heard Mr S Whish-Wilson on behalf of the Minister for Health and Mr J Mossenton on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch, Ms L Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers and Mr J Murie on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, WA Branch, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby makes the WA Government Health Services Engineering and Buildings Services Award 2004 in the terms of the schedule attached hereto. Such award shall operate from the 1<sup>st</sup> pay period commencing on or after the 22<sup>nd</sup> day of March 2004.

(Sgd.) P.E. SCOTT,  
Commissioner.

[L.S.]

**SCHEDULE****PART 1 - APPLICATION AND OPERATION OF AWARD****1. - TITLE**

- (1) This Award shall be known as the WA Government Health Services Engineering and Building Services Award 2004 and shall replace the following awards only insofar as they apply to the WA Government Health Services:
- Building Trades (Government) Award 1968 No. 31a of 1966;
  - Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962;
  - Engine Drivers (Government) Award 1983 No. A5 of 1983; and
  - Metropolitan Health Service Engineering and Building Services Award 1999.

**1B. - MINIMUM ADULT AWARD WAGE**

- No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.
- The Minimum Adult Award Wage for full time adult employees is \$448.40 per week payable on and from 5 June 2003.
- The Minimum Adult Award Wage of \$448.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.
- Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.
- Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of \$448.40 per week.
- The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.
  - Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.
- Subject to this clause the Minimum Adult Award Wage shall -
  - apply to all work in ordinary hours.
  - apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.
- Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2003 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.

(9) Adult Apprentices

- (a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than the following amounts –
- (i) \$285.00 per week from the beginning of the first pay period commencing on or after 1<sup>st</sup> November 2003;
  - (ii) \$315.00 per week from the beginning of the first pay period commencing on or after 31<sup>st</sup> January 2004; and
  - (iii) \$406.70 per week from the beginning of the first pay period commencing on or after 30<sup>th</sup> April 2004.
- (b) The rate paid at paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.
- (c) Where in an Award an additional rate is expressed as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of the apprenticeship.
- (d) Nothing in this sub-clause shall operate to reduce the rate of pay fixed by the Award for an adult apprentice in force immediately prior to 5 June 2003.

2. - ARRANGEMENT

PART 1 - APPLICATION AND OPERATION OF AWARD

- 1. Title
- 1B Minimum Adult Award Wage
- 2. Arrangement
- 3. Term
- 4. Application and Parties Bound
- 5. Area and Scope
- 6. Definitions
- 7. Liberty to apply

PART 2 - COMMUNICATION, CONSULTATION AND DISPUTE RESOLUTION

- 8. Commitments of the Parties
- 9. Introduction of Change
- 10. Right of Entry
- 11. Dispute Resolution

PART 3 - EMPLOYER AND EMPLOYEE DUTIES, EMPLOYMENT RELATIONSHIP, EQUIPMENT, TOOLS AND AMENITIES

- 12. Contract of Service
- 13. Mobility and Deployment
- 14. Temporary, Part time and Casual Employees
- 15. Uniforms, Protective Clothing and Equipment
- 16. Supported Wage

PART 4 - SALARIES AND RELATED MATTERS

- 17. Payment of Salaries
- 18. Salary Packaging
- 19. Leading Hand Allowance
- 20. Higher Duties
- 21. Apprentices
- 22. Access to Records
- 23. Special Rates and Provisions

PART 5 - HOURS OF WORK, BREAKS, OVERTIME AND SHIFTWORK

- 24. Hours of Work and Rostering
- 25. Overtime
- 26. Shiftwork

PART 6 - LEAVE OF ABSENCE AND PUBLIC HOLIDAYS

- 27. Casual Employees
- 28. Public Holidays
- 29. Annual Leave
- 30. Leave Options
- 31. Sick Leave
- 32. Long Service Leave
- 33. Training Leave
- 34. Union Representatives
- 35. Defence Force Training Leave

- 36. Witness and Jury Service
- 37. Bereavement Leave
- 38. Parental Leave
- 39. Family Leave
- 40. Paid Leave for English Language Training
- 41. Special Leave Without Pay
- 42. Special Leave With Pay
- 43. Sabbatical Leave
- 44. Emergency Service Leave
- 45. Ceremonial and Cultural Leave
- 46. Donors Leave

**PART 7 - TRANSFERS, TRAVELLING AND WORKING AWAY FROM USUAL PLACE OF WORK**

- 47. Car Allowance
- 48. Fares & Travelling Allowances
- 49. Travelling Allowance
- 50. District Allowances
- 51. Employees North of 26th Parallel – Travel Concession, Annual Leave

**PART 8 - APPENDICES**

APPENDIX A – Salaries

APPENDIX B – Workplace Reform

APPENDIX C - Saving of Certain Provisions of Industrial Agreements replaced by this Award.

APPENDIX D – 12 Hour Shift Arrangements for Plant Operators

3. - TERM

This award shall operate for a period of six months from the date of issuance.

4. - APPLICATION & PARTIES BOUND

- (1) The following are parties to and bound by this Award;
  - (a) The Minister for Health incorporated as the Board of the hospitals formerly comprised in the Metropolitan Health Service Board, under s7 of the Hospitals and Health Services Act 1927 (WA).
  - (b) The Minister for Health incorporated as the WA Country Health Service, under s7 of the Hospitals and Health Services Act 1927 (WA).
  - (c) The Minister for Health incorporated as the South West Health Board, under s7 of the Hospitals and Health Services Act 1927 (WA).
  - (d) The Minister for Health incorporated as the Peel Health Services Board under s7 of the Hospitals and Health Services Act 1927 (WA).
  - (e) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch.
  - (f) The Plumbers and Gasfitters Employees' Union of Australia, Western Australian Branch, Industrial Union of Workers.
  - (g) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch.
  - (h) The Construction, Forestry, Mining and Energy Union of Workers.

5. - AREA AND SCOPE

- (1) This Award shall operate throughout the State of Western Australia.
- (2) This Award shall apply to employees, including apprentices:
  - (a) employed by the Employer and / or any facility or service managed, controlled or operated by the Employer;
  - (b) engaged in any of the callings specified in Appendix A. - Salaries.
- (3) This Award shall not apply to the construction or maintenance of water supply, sewerage or drainage works within the area covered by the Water Supply Award No. 8 of 1956 or any award replacing that award.
- (4) This Award shall not apply to work coming within the scope of the Hospital Salaried Officers Award No. 39 of 1968.

6. - DEFINITIONS

- (1) "Accredited official" means a Secretary or official of a Union party to this Award. In the case of an official, he/she shall only be deemed an "accredited official" when the holder for the time being of a certificate signed by the relevant Union Secretary and bearing the Union's seal.
- (2) "AHS" means Area Health Service grouping of HCU's which are run and operated under a single managerial structure.
- (3) "Construction work" means work on site in or in connection with:
  - (a) the construction of a large industrial undertaking or any large civil engineering project;
  - (b) the construction or erection of any multi-storey building; and
  - (c) the construction, erection or alteration of any other building, structure or civil engineering project which the Employer and the Union(s) agree or, in the event of disagreement, which the Western Australian Industrial Relations Commission declares to be construction work for the purpose of this Award.
- (4) "Continuous service" shall include any period during which an employee is on annual leave and/or holidays, any approved period an employee is absent from duty through sickness, with or without pay, unless the absence exceeds three calendar months, in which case the period in excess of three months shall not be counted as continuous service. In the

case of approved periods of absence from work due to workers compensation, the first six months only of any such period shall count as continuous service. This definition shall not apply to continuous service for the purpose of calculating long service leave.

- (5) "Continuous shift worker" means an employee who is contracted to work ordinary hours of duty in accordance with a roster where the employee is rostered for afternoon and/or night shift with day shift as defined in Clause 26 - Shiftwork and who may be rostered to work on any of the days of the week that the service operates.
- (6) "Day off duty" means a day on which an employee is not rostered to work and for which the employee has no entitlement to pay.
- (7) "Employer" means the parties detailed in subclauses (1)(a),(b),(c) and (d) of Clause 4 – Application and Parties Bound, of this Award.
- (8) "Full-time employee" means an employee who is employed to work an average of 38 hours per week.
- (9) "HCU" means Health Care Units, which are the various discrete operational units of an Area Health Service.
- (10) "Metropolitan area" means that area in a radius of 50 kilometres from the Perth Central Railway Station.
- (11) "Ordinary salary" shall mean the appropriate salary rate prescribed in Appendix A. - Salaries.
- (12) "Parties" means the Employer and the Unions bound by this Award.
- (13) "Part-time employee" means an employee regularly employed to work less than an average of 38 ordinary hours per week.
- (14) "Rostered day off" means the paid day(s) off accruing to an employee resulting from the employee working an average of a 38 hour week and taken in accordance with the agreed roster.
- (15) "Union(s)" means any or all of the union organisations bound by this Award.
- (16) "WA Government Health Services" means all of the employers collectively, who are bound by this Award.

#### 7. – LIBERTY TO APPLY

- (1) If this Award is deficient because of any oversight, omission or error arising in the consolidation and rationalisation of the awards listed in Clause 1 – Title, there shall be liberty to apply to amend the Award to correct such deficiency.
- (2) There shall be liberty to apply to vary this Award to:
  - (a) include provisions relating to the definitions, scope of work and rates of pay for Hospital Maintenance Technician.
  - (b) adjust allowances and salaries in accordance with State Wage Decisions.

### **PART 2 - COMMUNICATION, CONSULTATION AND DISPUTE RESOLUTION.**

#### 8. - COMMITMENTS OF THE PARTIES.

- (1) Award Modernisation
 

The parties are committed to modernising the terms of the Award so that it provides for more flexible working arrangements, improves the quality of working life, enhances skills and job satisfaction.
- (2) Structural Efficiency
 

The parties are committed to co-operating positively to increase the efficiency, productivity and competitiveness of the Employer and to enhance the career opportunities and job security of employees.
- (3) The parties are committed to maintaining the integrity of competency based training, the Award classification definitions and nationally approved competency standards, within the context of the operational requirements of the Employer. In so doing the parties to this Award reaffirm their commitment to maintaining the integrity of structured trade training.
- (4) Occupational Safety and Health.
 

The Parties are committed to continuing active participation in the Occupational Safety and Health management process which operates within the HCU and to ensuring the relevant Acts, regulations, codes of practice and standards are adhered to.
- (5) Consultation
  - (a) Establishment of a HCU Consultative Committee
 

Where any party so requests, the Parties shall establish a Consultative Committee as a vehicle to improve communication and genuine consultation in the workplace.
  - (b) Role of the HCU Consultative Committee
    - (i) Without limiting the range of activities and matters which the Parties may at any time agree to include in the Terms of Reference of the Committee, the Committee shall deal with any industrial matters.
    - (ii) The Committee shall develop and endorse its own specific Terms of Reference.
  - (c) Composition of the HCU Consultative Committee
    - (i) The Committee shall, subject to subclause (5)(c)(iii), consist of equal numbers of representatives of employees and the Employer. The Employee representatives shall be directly elected by all employees to whom this Award applies and who are engaged at that HCU.
    - (ii) For the purposes of the election of employee representatives to the Committee and the conduct of the business of the Committee there shall be no distinction made by the Parties between members and non-members of the Unions.
    - (iii) The Unions may nominate up to three additional accredited workplace representatives as members of the Committee.
    - (iv) Each Union may each nominate an official to attend meetings of the Committee.

- (d) General
- (i) Meetings of the Committee shall be scheduled to occur during the ordinary working hours of members. It is however acknowledged that some commitment of members time outside of normal working hours may be required.
  - (ii) The Employer shall provide Committee members with reasonable time away from their normal work to undertake the duties of members, which shall include but shall not necessarily be limited to:
    - (aa) Formal and informal consultation with staff in the workplace.
    - (bb) Participation in working parties which may be established by the Committee.
    - (cc) Meetings of employee representatives immediately prior to meetings of the Committee.
    - (dd) Participation in agreed training designed to equip members with the knowledge and skills to contribute effectively to the business of the Committee.
  - (iii) The Committee shall develop agreed protocols for the release of members from their normal work.
  - (iv) The Parties shall agree, on a HCU by HCU basis, on the resources necessary to support the functioning of the Committee.

#### 9. - INTRODUCTION OF CHANGE.

- (1) Employer's Duty to Notify
- (a) The Employer shall notify the employees and the Union(s), where the Employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology, that are likely to have significant effects on the employees.
  - (b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the Employer's work force or in the skills required; the elimination or lessening of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for re-training or transfer of employees to other work or locations and the re-structuring of jobs. Provided that an alteration shall not be deemed to have "significant effects" where the Award provides for such alteration.
- (2) Employer's Duty to Discuss Change
- (a) Discussion between the Employer and the employee(s) affected and the Union(s) shall commence as soon as possible after a firm decision has been made by the Employer to make the changes referred to in subclause (1)(a) above.
  - (b) Such discussions shall include: the effects the changes are likely to have on employee(s) and measures to reduce the adverse effects of such changes; and
  - (c) The Employer shall give prompt consideration to matters raised by the employee(s) and/or the Union(s) in relation to the changes.
  - (d) For the purposes of such discussion, the Employer shall provide to the employee(s) concerned and the Union(s), all relevant information about the changes, provided that the Employer shall not be required to disclose confidential information, which would be inimical to the Employer's interest.

#### 10. - RIGHT OF ENTRY

- (1) An accredited official shall, on no less than 1 days' prior notification to the Employer, or a lesser period where so specified by the Western Australian Industrial Relations Act, or as agreed to by the parties, have the right to enter the workplace during working hours, including meal breaks, for the purpose of discussing with employees covered by this Award, the legitimate business of the Union or for the purpose of interviewing employees, checking on wage rates, investigating award breaches or complaints concerning the application of this Award, or any other industrial matter, but shall in no way unduly interfere with the work of the employees.
- (2) The accredited official shall show the authority issued by the Western Australian Industrial Relations Commission if requested to do so.
- (3) The provisions of this clause shall not limit the authority of the provisions of the Industrial Relations Act 1979.
- (4) Union Notices  
Subject to the provisions of this clause, the Employer shall allow an accredited official to post a copy of this Award or any Union notice on nominated notice boards.
- (5) Notice Board  
Notice board(s) on which Union notices may be posted shall be provided by the Employer in suitable locations.

#### 11. - DISPUTE RESOLUTION

- (1) Dispute Procedure  
In order to minimise the effect of any question, dispute or difficulty that may arise between the Parties or between the Employer and its employee(s), it is agreed that the following procedure shall be observed.
- (a) Where a dispute, grievance or other question arises, the employee(s) concerned shall raise the matter with the appropriate Supervisor or other nominated representative.
  - (b) If not satisfactorily settled, or in cases where the matter is of such a nature as to warrant the omission of the step detailed in subclause (1)(a) hereof, the shop steward and/or the employee(s) concerned shall discuss the matter with the appropriate Employer representative.
  - (c) If satisfaction is not achieved, the Shop Steward of the employee(s) shall refer the matter to an appropriate full time official of the Union, who shall discuss the matter with the appropriate representative of the Employer.
  - (d) Each of the foregoing steps shall be followed in good faith and without any undue or unreasonable delay by any party. The parties agree that 3 working days shall normally be considered reasonable for the purposes of moving from one to another of each of the foregoing steps.

- (e) This procedure shall not apply in the event of any genuine issue involving the safety of the employee(s), or other person.
  - (f) Throughout the foregoing procedure normal work shall continue. No party shall be prejudiced to final settlement by the continuance of work in accordance with this subclause.
  - (g) At the employee's option, a shop steward or another nominated person may also be present at any of the meetings held regarding the dispute, grievance or question.
- (2) **Disciplinary Procedure**  
Where the Employer seeks to discipline an employee or terminate an employee the following steps shall be observed:
- (a) In the event that an employee commits a misdemeanour, the employee's immediate supervisor or any other officer so authorised, may exercise the right to reprimand the employee so that the employee understands the nature and implications of his/her conduct.
  - (b) The first two reprimands shall take the form of warnings and, if given verbally shall be confirmed in writing as soon as practicable after the giving of the reprimand.
  - (c) Should it be necessary, for any reason, to reprimand an employee in writing three times within a twelve month period, the contract of service may, subject to the principles of natural justice, upon the giving of that third reprimand, be terminable in accordance with the provisions of this Award.
  - (d) The above procedure is meant to preserve the rights of the individual employee, but it shall not in any way , limit the right of the Employer to summarily dismiss an employee for misconduct.
- (3) **Access to the Commission**
- (a) At any stage of these procedures, either party may refer the matter to the Western Australian Industrial Relations Commission for resolution. However, this shall not occur until such time as the persons involved in the question, dispute or difficulty have made a reasonable attempt to resolve the question, dispute or difficulty.
- (4) **Maintenance of Services**
- (a) The Union(s) recognise that the Employer has a statutory and public responsibility to provide health care services without any avoidable interruptions.
  - (b) The grievance procedure has been developed between the Parties to provide an effective means by which employees may reasonably expect problems to be dealt with as quickly as possible by the Employer.
  - (c) Accordingly, the Union(s) agree that during any period of industrial action, sufficient labour shall be made available to carry out work essential for life support within the Employer's operation's.
  - (d) The Parties shall agree, on a HCU by HCU basis,- in writing on guidelines on the supply of labour and circumstances in which such labour shall be called upon at each HCU .

**PART 3 - EMPLOYER AND EMPLOYEE DUTIES, EMPLOYMENT RELATIONSHIP, EQUIPMENT, TOOLS AND AMENITIES.**

12. - CONTRACT OF SERVICE

- (1) Appointments shall be made in writing. The letter of appointment shall include the terms of the employee's appointment and shall appoint the employee to a classification under Appendix A - Salaries of this Award.
- (2) The contract of service shall be by the fortnight and, except as provided in subclause (5), (6) and (12)(b), shall be terminable by the giving of 2 weeks notice on either side or by the payment or forfeiture, as the case may be, of up to 2 weeks salary.  
Provided that, by agreement between the Employer and employee, the notice or payment prescribed may be varied or waived.
- (3) An employee appointed by an employer bound by this Award, shall be on probation for a period not exceeding three months, unless otherwise determined by the employer. However, employees appointed from within the Western Australian public sector who have prior permanent employment which is continuous with their appointment under this Award, will not be required to serve a probationary period.
- (4) Prior to the expiry of a period of probation, the employer shall:
  - (a) confirm the appointment; or
  - (b) terminate the services of the employee.
 Provided that, prior to the expiry of the initial three month period of probation, an employer may extend an employee's period of probation for a further period not exceeding three months' duration, but where this occurs, the employer shall notify the employee in writing of the extension and the reasons therefore.
- (5) At any time during a period of probation the employer may annul the appointment and terminate the services of the employee. During a period of probation, the contract of service shall be by the week and shall be terminable by the giving of 1 weeks notice on either side or by the payment or forfeiture, as the case may be, of up to 1 weeks salary.
- (6) The contract of service for:
  - (a) a casual employee, shall be by the hour.
  - (b) a temporary employee, shall be for the term specified in the employee's letter of appointment.
- (7) Employees may be directed to perform any job within their area of expertise and scope of activity up to and at the classification level to which they are appointed provided that they have the necessary skills and competencies.
- (8) The Employer is entitled to deduct payment for any day or part thereof where the employee does not perform all duties as directed, consistent with the employee's classification, unless such non-performance is authorised in writing by the Employer.

- (9) Provision of Work
- (a) An employee, if engaged, and on presenting himself/herself for work to commence employment is not required, shall be entitled to at least 8 hours' work or payment thereof at ordinary rates and to payment of the appropriate allowance prescribed by Clause 48 - Fares and Travelling Allowances of this Award.
- (b) This subclause shall not apply if an employee is not required by reason of inclement weather, in which case the provisions of Clause 39 - Inclement Weather of the Building Trades Award No. 31 of 1966 shall apply.
- (10) An employee shall be guaranteed a full weeks work provided that the Employer is entitled to deduct payment for any day or part thereof where:
- (a) an employee cannot be usefully employed due to strike action by any union or association provided that employees who are required to attend for work and do so attend as required on any day, shall be paid a minimum of one day's pay at ordinary rates.
- (b) an employee is unable to work due to the breakdown of the Employer's machinery or through any stoppage of work by any cause which the Employer cannot reasonably prevent;  
Provided that, in the case of wet weather, the decision as to whether it is too wet to work shall rest with the Employer, however, wet weather shall not affect an employees entitlement to payment.
- (c) An employee not paid in accordance with paragraph (10)(a) or (10)(b) shall not lose benefits which the employee would ordinarily attract under this Award, provided that the employee resumes work as required after the stand down, and provided that the employee shall not be entitled to payment for any public holiday occurring during the period of the stand down where the stand down occurs under paragraph (10)(a).
- (11) The Employer shall be under no obligation to pay for any day or portion of a day not worked on which the employee is required to present him/herself for duty and does not, except where the absence is due to illness and comes within the provisions of Clause 31. - Sick Leave or the absence is due to holidays to which the employee is entitled under the provisions of this Award.
- (12) Termination of Employment
- (a) This clause does not affect the Employer's right to dismiss an employee for misconduct and an employee so dismissed shall be paid salary up to the time of dismissal only.
- (b) Period of Notice  
Subject to paragraph (6) and (12)(a), the Employer must not terminate an employee's employment unless the following periods of notice are given or an employee is paid compensation in lieu of notice. This requirement to pay notice does not apply to apprentices, casuals, or persons employed for a specified period of time.
- | <u>Period of continuous service with the Employer</u> | <u>Period of Notice</u> |
|---|-------------------------|
| Not more than 3 years                                 | At least 2 weeks        |
| More than 3 years but not more than 5 years           | At least 3 weeks        |
| More than 5 years                                     | At least 4 weeks        |
- (c) The period of notice prescribed in paragraph (12)(b) is increased by one week if the employee is over 45 years old and has completed at least 2 years continuous service with the Employer.
- (13) Written Statements
- (a) A dismissed employee may request in writing, a written statement from the Employer detailing the reason(s) for termination. The Employer shall provide such statement within 14 days of receipt of the request. Provided that in the case of dismissal for misconduct, the reason for such dismissal must be given in writing.
- (b) A dismissed employee may make a written request to the Employer for a statement of service. The Employer shall provide such statement within 3 working days following receipt of the request.

### 13. - MOBILITY AND DEPLOYMENT

This clause has application only to those HCU's comprising the Metropolitan Health Services. The standards prescribed in any applicable Public Sector Standard shall apply to the application of this clause. The Employer shall ensure equity of access to deployment opportunities.

- (1) Headquarters
- (a) Each employee shall be assigned to a specific HCU and that HCU shall be the employee's headquarters. The headquarters of an employee as at the date of registration of this Award shall be the HCU at which the employee is working on that date.
- (b) An employee may be transferred to another HCU by the giving of 3 months notice or such lesser period of notice as may be agreed with the employee. Any decision to transfer an employee to alternate headquarters shall be taken only after reasonable consultation with the employee, and in reaching such a decision regard shall be had to the:
- (i) career aspirations of the employee.
- (ii) family & carer responsibilities of the employee.
- (iii) availability of transport.
- (iv) availability of work at a level commensurate with the classification of the employee.
- (v) any direct or indirect costs incurred by the employee.
- (vi) the suitability of the position to which the employee is being transferred having regard to the skills, abilities and competencies of the employee.
- (2) Temporary Deployment
- (a) An employee may be temporarily rostered to work at another HCU for any period of not less than 1 week or more than 3 months, unless otherwise agreed.

- (b) An employee temporarily rostered to work at another HCU shall be paid not less than the usual rate for the employee's classification.
  - (c) The employee shall be advised of the terms and the duration of the temporary deployment in writing.
  - (d) The employee shall be reimbursed any reasonable net additional travelling costs incurred as a result of the employee being temporarily rostered to work at another HCU.
  - (e) Any reasonable net additional travelling time incurred by the employee as a result of the employee being temporarily rostered to work at another HCU shall be counted as ordinary working hours.
  - (f) The parties may from time to time agree on payment of a weekly rate in substitution for the preceding travelling costs and / or travelling time compensation arrangements.
  - (g) Access to temporary deployment opportunities shall as far as practicable be equitably available to all employees.
- (3) Adhoc Deployment
- (a) By agreement between an employee and the Employer, the employee may be rostered to work at another HCU on an adhoc basis
  - (b) An employee temporarily rostered to work at another HCU shall be paid not less than the usual rate for the employee's classification.
  - (c) The employee shall be reimbursed any reasonable net additional travelling costs incurred as a result of the employee being required to work at another HCU on an adhoc basis.
  - (d) Any reasonable net additional travelling time incurred by the employee as a result of the employee being required to work at another HCU on an adhoc basis shall be counted as ordinary working hours.
  - (e) The parties may from time to time agree on payment of a daily rate in substitution for the preceding travelling costs and travelling time compensation arrangements.
  - (f) Access to adhoc deployment opportunities shall as far as practicable be equitably available to all employees.
  - (g) For the purposes of this sub clause "ad hoc deployment" means deployment for a period of less than 1 week.
- (4) An employee may request regular, temporary or adhoc deployment to a HCU other than the employees headquarters for the purposes of acquiring additional competencies or experience or change in location. Where the Employer gives effect to such a request, the Employer shall not be obliged to defray any additional travelling costs or travelling time incurred by the employee. However the Employer shall provide such compensation as it deems appropriate if the acquisition of the additional competencies or experience is in the interests of the Employer.
- (5) Nothing in this clause is intended to limit the employer's capacity to roster an employee to work at different worksites within a HCU.

#### 14. - TEMPORARY, PART TIME & CASUAL EMPLOYEES.

- (1) Temporary Employees
- (a) A temporary employee shall be paid the rate of pay for the classification prescribed by this Award for the work performed, for the period of the employment.
  - (b) A temporary employee shall be entitled to all the conditions of employment prescribed by this Award provided that no provision of nor anything done pursuant to this Award, shall have the effect of extending the term of employment of a temporary employee.
- (2) Part-time Employees
- (a) A part-time employee shall be paid on a pro-rata basis according to the hours worked, at the rate of pay for the classification prescribed by this Award for the work performed.
  - (b) A part-time employee shall be entitled to the conditions of employment prescribed by this Award for the work performed, on a pro-rata basis.
- (3) Casual Employees
- (a) A "Casual Employee" shall mean an employee who is engaged to work for not more than 5 consecutive days.
  - (b) A casual employee shall be paid a loading of 20 per cent in addition to the rates prescribed by Appendix A. - Salaries.
- (4) The Parties shall agree in writing, on a AHS by AHS basis, on guidelines on the ordinary use of temporary labour at each AHS.

#### 15. - UNIFORMS, PROTECTIVE CLOTHING AND EQUIPMENT

- (1) Uniforms and Protective Clothing
- (a) The Employer shall supply and the employee shall wear such protective clothing and footwear as is required.
  - (b) The Employer may supply uniforms and may require them to be worn at all times when considered necessary by the Employer, in sufficient quantity to ensure a clean uniform per shift.
  - (c) Protective clothing or uniforms supplied under paragraphs (1)(a) or (1)(b) of this subclause shall remain the property of the Employer.
  - (d) All washable clothing forming part of the protective clothing or uniforms supplied by the Employer shall either be laundered by the Employer or in lieu thereof the employee may be paid a laundry allowance. The amount of the laundry allowance and those items of protective clothing or uniforms to be laundered by the employee shall be as agreed from time to time between the parties.
  - (e) The standard uniform issue may be varied by agreement between the Employer and the Union(s).
  - (f) By agreement, on an HCU basis, the parties may agree on alternative arrangements for the provision and laundering of uniforms and protective clothing at each HCU .

- (g) HCU specific arrangements for the provision and laundering of uniforms and protective clothing as at the date of registration of this Award shall not be changed by the Employer without prior consultation.
- (2) Protective Equipment
- (a) The Employer shall make available a sufficient supply of personal issue protective equipment for use by employees when engaged on work for which such personal issue protective equipment is reasonably necessary, and employees shall be required to appropriately use such protective equipment, in accordance with the requirements of the Occupational Safety and Health Act 1984.
- (b) An employee shall not lend another employee any personal issue protective equipment issued to the first mentioned employee.

(3) Change Room

A suitable and convenient change room shall be available for employees to use. The change room shall not be used for storing noxious materials.

16. – SUPPORTED WAGE

- (1) This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award. In the context of this clause, the following definitions will apply:

- (a) “Supported Wage System” means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability as documented in “[Supported Wages System: Guidelines and Assessment Process]”.
- (b) “Accredited Assessor” means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual’s productive capacity within the Supported Wage System.
- (c) “Disability Support Pension” means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.
- (d) “Assessment Instrument” means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(2) Eligibility Criteria

Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of worker’s compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their current employment).

The clause also does not apply to employers in respect of their facility, program, undertaking, services or the like which receives funding under the Disability Services Act 1986 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a Disability Support Pension, except with respect to an organisation which has received recognition under s.10 or s.12A of the Act, or if a part has received recognition, that part.

(3) Supported Wage Rates

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this award for the class of work which the person is performing according to the following schedule:

Assessed Capacity (subclause 4)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than \$56 per week).

\*Where a person’s assessed capacity is 10%, they shall receive a high degree of assistance and support.

(4) Assessment of Capacity

For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (a) the employer and the union in consultation with the employee or, if desired by any of these; or
- (b) the employer and an accredited Assessor from a panel agreed by the parties to the award and the employee.

(5) Lodgement of Assessment Instrument

- (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Western Australian Industrial Relations Commission.
- (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the award, is not a party to the assessment, it shall be referred by the Registrar to the

Union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

(6) Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

(7) Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this award paid on a pro-rata basis.

(8) Workplace Adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the area.

(9) Trial Period

(a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.

(b) During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(c) The minimum amount payable to the employee during the trial period shall be no less than \$56 per week; or, in the case of paid rates award, the amount payable to the employee during the trial period shall be \$56 per week or such greater amount as is agreed from time to time between the parties (taking into account the Centrelink income test free areas for earnings) and inserted into this award.

(d) Work trials should include induction or training as appropriate to the job being trialed.

(e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4) of this clause.

**PART 4 - SALARIES AND RELATED MATTERS.**

17. - PAYMENT OF SALARIES.

(1) Payment of Salaries

(a) Each employee shall be paid the annual salary, proportionate to hours worked, prescribed for his or her classification in Appendix A. - Salaries.

(i) The weekly rate of pay shall be calculated by dividing the prescribed annual salary by 52.166.

(ii) The hourly rate of pay shall be calculated by dividing the weekly rate of pay by 38.

(b) Employee's annual salary shall be paid in equal fortnightly instalments by direct funds transfer into an account nominated by the employee at an approved bank, building society or credit union.

(c) Where exceptional circumstances exist and direct funds transfer is impractical, by agreement between the Employer and employee, payment by cheque may be made.

(2) Deductions

(a) Deductions for income tax, superannuation and such other purposes as may be prescribed by law, shall be made automatically from the employee's pay.

(b) Where the Employer and employee agree in writing, deductions for any other purpose may be made. The Employer may withdraw from any such agreement with four weeks notice. The employee may direct that any such deductions shall cease with one clear pay periods notice.

(3) Payment on Ceasing Employment

(a) When an employee ceases employment before the usual pay day, the employee shall be paid his / her final pay by cheque on the day he / she ceases work.

(b) Notwithstanding paragraph (3)(a), the Employer may elect to forward, at the Employers risk, a cheque by registered post to the employees last recorded home address, within seven days of the date the employee ceases work.

(c) Notwithstanding paragraph (3)(a), the Employer may elect to deposit the final pay into the account nominated pursuant to paragraph (3)(b), within 7 days of the date the employee ceases work.

(4) Recovery of Overpayments

(a) If employees are paid for work not subsequently performed or are overpaid due to administrative or similar error, the Employer shall, after consultation with the employee, make adjustments to the employees subsequent fortnightly salary payments.

(i) A one-off overpayment shall be recovered in the pay period immediately following the pay period in which it was made, or in the period immediately following the pay period in which it was discovered that the overpayment had occurred.

(ii) Cumulative overpayments shall be recovered at a rate agreed between the Employer and the employee provided that if the Employer and the employee can not agree on a reasonable recovery rate the Western Australian Industrial Relations Commission may determine what is reasonable in the circumstances.

- (b) Any other arrangements for the recovery of overpayments may be agreed between the Parties.

#### 18. - SALARY PACKAGING

- (1) An employee may, by agreement with the Employer, enter into a salary packaging arrangement.
- (2) Salary packaging is an arrangement whereby the entitlements under this Award, contributing toward the Total Employment Cost (as defined) of an employee, can be reduced by and substituted with another, or other benefits.
- (3) For the purpose of this clause, Total Employment Cost (TEC) is defined as the cost of salary and other benefits aggregated to a total figure or TEC, less the cost of Compulsory Employer Superannuation Guarantee contributions.
- (4) The TEC for the purposes of salary packaging, is calculated by adding:
- The base salary;
  - Other cash allowances, eg annual leave loading,
  - Non cash benefits, eg superannuation, motor vehicles etc;
  - Any Fringe Benefit Tax liabilities currently paid; and
  - Any variable components, eg performance based incentives (where they exist).
- (5) Where an employee enters into a salary packaging arrangement they shall be required to enter into a separate written agreement with the Employer that sets out the terms and conditions of the arrangement. To the extent of any inconsistency between the separate written agreement and the provisions of this Award, the provisions of this Award shall have precedence.
- (6) The salary packaging arrangement must be cost neutral in relation to the total cost to the Employer.
- (7) The salary packaging arrangement must also comply with relevant taxation laws and the Employer shall not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.
- (8) In the event of any increase or additional payments of tax or penalties associated with the employment of the employee or the provision of Employer benefits under the salary packaging agreement, such tax, penalties and any other costs shall be borne by the employee.
- (9) In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to arrangements under this clause, the employee may vary or cancel a salary packaging arrangement.
- (10) The Employer shall not unreasonably withhold agreement to salary packaging on request from an employee.
- (11) The Dispute Settlement Procedures contained in this Award shall be used to resolve any dispute arising from the operations of this clause. Where such a dispute is not resolved, the matter may be referred by either party to the Western Australian Industrial Relations Commission.
- (12) For the purposes of this provision, any penalty rate, loading or other wage related allowances which would ordinarily be calculated on the basis of the salary rates expressed in Clause 17 - Payment of Salaries shall continue to be so calculated despite an election to participating in any salary packaging arrangement.

#### 19. - LEADING HAND ALLOWANCE

- (1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid -
- Not less than 3 and not more than 10 other employees - \$31.84 per week;
  - More than 10 and not more than 20 other employees - \$42.59 per week;
  - More than 20 other employees - \$53.33 per week.
- (2) The rates herein prescribed shall be deemed to form part of the ordinary rate of salary of the employees concerned for all purposes of this Award.
- (3) Nothing in the Award shall require payment of a leading hand allowance to an employee placed in charge of other employees if that employees classification defines the exercise of supervisory / leading hand duties.

#### 20. - HIGHER DUTIES

- (1) An employee who is required by the Employer to act in a position which attracts a higher rate of pay than the employee's ordinary rate of pay, shall be paid higher duties based on the difference between the rates of pay and the proportion of the higher classified duties which were assigned, provided that:
- An employee who undertakes higher duties for more than 2 hours in a shift shall in addition be paid higher duties for the whole of the remainder of the shift.
  - No higher duties allowance is payable to an employee who is required to act in a position solely because the substantive occupant is on a single rostered day off.

#### 21. - APPRENTICES.

- (1) Apprentices may be taken in the ratio of one apprentice for every 2 or fraction of 2 (the fraction being not less than 1) tradespersons and shall not be taken in excess of that ratio unless -
- The Union or Unions concerned so agree; or
  - The Western Australian Industrial Relations Commission so determines.
- (2) Where an apprentice's rostered day off duty as prescribed in Clause 24. - Hours of Work and Rostering falls within a period of block release, an alternative rostered day off shall be arranged at a mutually convenient time.
- (3) Salary

Term	Percentage of Tradesperson's Rate
(a) Four year term -	
First year	42
Second year	55
Third year	75
Fourth year	88

Term	Percentage of Tradesperson's Rate
(b) Three and a half year term -	
First six months	42
Next year	55
Next following year	75
Final year	88
(c) Three year term -	
First year	55
Second year	75
Third year	88
(d) The Tradesperson's rate is the rate applicable to a Mechanical Fitter Level 10 under this Award	
(4) Notwithstanding any other provision of this Award, an apprentice 21 years of age or over shall not be paid less than 75% of the Tradesperson's rate.	
(5) If, through no fault of his/her own, an apprentice fails to attend a period of training in any week, fortnight or year as prescribed that period shall be made up during the final year of the apprenticeship if the Employer and the training authority so arrange.	
(6) An apprentice shall be released to attend vocational classes or classes of instruction in accordance with the Industrial Training Act 1975, the Industrial Training (Apprenticeship Training) Regulations 1981 or the Apprenticeship Agreement as the case requires. Apprentices shall be paid the ordinary salary they would otherwise have been paid during the period they are released from work.	
(7) The provisions of this Award shall be read in conjunction with the Industrial Training Act 1975 and the Industrial Training (Apprenticeship Training) Regulations 1981.	

#### 22. - ACCESS TO RECORDS

- (1) Inspection of Time and Salaries Records
- (a) The Employer shall maintain a time and salaries record for each employee.
- (b) The entries in the time and salaries records for each employee shall include:
- (i) the name and details of each employee;
  - (ii) the employee's job classification or description and whether full-time, part-time, temporary or casual;
  - (iii) the hours worked each day including roster details, if applicable;
  - (iv) the salaries, allowances and overtime paid to each employee and any deductions made there from.
- (c) Computerised time and salaries records may be kept by the Employer and shall be deemed to satisfy the requirements of this clause to the extent of the information recorded.
- (d) The Employer must ensure that each entry in the time and salaries record is retained for not less than 7 years after it is made.
- (e) A representative of the Union(s) shall have the power to inspect the time and salaries records of an employee or former employee.
- (f) The Employer may refuse the representative access to the records if -
- (i) the Employer is of the opinion that access to the records by the representative of the Union would infringe the privacy of persons who are not members of the Union; and
  - (ii) the Employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative.
- (g) The power of inspection may only be exercised by a representative of a Union authorised in accordance with the rules of the Union to exercise the power.
- (h) Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the Employer.
- (i) The Employer or Union(s) bound by and party to this Award may apply to the Western Australian Industrial Relations Commission at any time in relation to this clause.
- (2) Access to Employee Files
- If the Employer maintains a personal or other file on an employee, the employee shall be entitled to arrange a time to examine all material maintained on that file, and may obtain excerpts/copies of material from the file.
- (3) Access to the Award
- An employee shall be entitled to have access to a copy of this Award. Sufficient copies shall be made available by the Employer for this purpose.

#### 23. - SPECIAL RATES AND PROVISIONS

- (1) Disability Allowances
- (a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. - Title, as at the date of registration of this Award.

- (b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of \$1.60 for each hour or part thereof whilst so engaged.
  - (c) Asbestos:
    - (i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority
    - (ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, ie. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of \$0.53 per hour for each hour or part thereof whilst so engaged.
  - (d) Furnace Work  
Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid \$1.17 per hour or part thereof whilst so engaged.
  - (e) Construction Allowance
    - (i) In addition to the appropriate rate of pay prescribed in Appendix A. - Salaries of this Award, an employee shall be paid -
      - (aa) \$35.20 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;
      - (bb) \$31.70 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storey building" is a building which, when completed, shall consist of at least five stories.
      - (cc) \$18.70 per week if engaged otherwise on Construction Work.
    - (ii) The rates specified in paragraph (1)(e)(i) shall be discounted by \$14.56 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.
  - (f) Asbestos Eradication
    - (i) This sub-clause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.
    - (ii) For the purposes of this clause "asbestos eradication" means work on or about buildings, involving the removal or any other method of neutralisation of any materials which consist of, or contain asbestos.
    - (iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.  
Without limiting the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.
    - (iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of \$1.16 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23.- Special Rates and Provisions
    - (v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (ie. 1716 "Specification of Respiratory Protective Devices") shall be worn by all personnel during work involving eradication of asbestos.
  - (g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.
- (2) Tools - Allowances and Provisions
- (a) The salary of all tradespersons employed under this Award incorporates a tool allowance for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of work as a tradesperson.
  - (b) The salary of all apprentices incorporates the percentage which appears against the relevant year of apprenticeship in subclause (3) of Clause 21. - Apprentices of the appropriate tradespersons tool allowance.
  - (c) The tool allowance prescribed in paragraph (2)(a) includes an amount for the purpose of enabling employees to insure their tools against loss or damage by theft or fire.
  - (d) Apprentice Tool Kits
    - (i) On commencement of an apprenticeship, the Employer shall provide an apprentice with a basic tool kit, the composition of which shall be agreed in writing between the parties on an AHS basis.
    - (ii) The tool kit provided in accordance with paragraph (2)(d)(i) of this subclause shall remain the property of the Employer until, on successful completion of the apprentices indenture, it shall become the property of the apprentice, without deduction.
    - (iii) Any dispute regarding the composition of the tool kit shall be addressed through the procedures contained in Clause 11. - Dispute Resolution.
  - (e) The Employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools and precision measuring instruments.
  - (f) A tradesperson or an apprentice shall replace or pay for any tools supplied by the Employer, if lost through the negligence of such employee.

- (g) An employee in receipt of a tool allowance shall provide him/herself with all necessary tools kept in suitable condition for the performance of the work.
- (h) Storage of Tools
- (i) The Employer shall provide a waterproof and reasonably secure place on each job where the employees' tools (when not in use) may be locked up apart from the Employer's plant or material.
- (ii) The Employer shall indemnify an employee in respect of any tools of the employee stolen if the Employer's failure to comply with this clause is a material factor in contributing to the theft of the tools.
- (3) Licences - Allowances and Provisions
- (a) Plumbing Trade Allowance  
The rate of salary specified in Appendix A. - Salaries of this Award, includes an amount in substitution of payment of the Plumbing Trade Allowance, as defined in the Building Trades (Government) Award 1968 No. 31a of 1966, to compensate for the classes of work specified therein as at the date of registration of this Award.
- (b) Permit Work  
Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid \$13.74 for that week in addition to the rates otherwise prescribed.
- (c) Electrical Trade Allowance  
The rate of salary specified in Appendix A. - Salaries of this Award, includes an amount in substitution of payment of the allowance for an electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical mechanic who holds in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948.
- (d) Scaffolding Certificate Allowance:  
A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid \$0.44 per hour or part thereof: in addition to the rates otherwise prescribed in this Award.
- (e) Nominee Allowance  
A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of \$13.79 per week.
- (f) Setter Out:  
A setter out (other than a leading hand) in a joiner's shop shall be paid \$4.15 per day in addition to the rates otherwise prescribed.
- (4) Industry Allowance  
The rate of salary specified in Appendix A. - Salaries of this Award, includes an amount in substitution of payment of the industry allowances as defined in the Building Trades (Government) Award 1968 No. 31a of 1966 and the Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962 as at the date of registration of this Award.
- (5) Hospital Environment Allowance  
The rate of salary specified in Appendix A. - Salaries of this Award, includes an amount in substitution of payment of the Hospital Environment Allowance as defined in the Building Trades (Government) Award 1968 No. 31a of 1966 and the Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962 as at the date of registration of this Award.
- (6) General  
The work of an electrical fitter/mechanic shall not be tested by an employee holding a lower grade licence.
- (7) Variation of Substituted Allowances and Special Rates  
No claim shall be made to vary the amount of allowances incorporated into the annual salary.

## **PART 5 - HOURS OF WORK, BREAKS, OVERTIME AND SHIFTWORK**

### 24. - HOURS OF WORK AND ROSTERING

- (1) Ordinary hours of work shall be an average of 38 hours per week.
- (2) Ordinary hours of work shall be worked as rostered, between 0600 hours and 1800 hours Monday to Friday, in 5 consecutive shifts of 7hours and 36 minutes (exclusive of meal breaks).
- (3) The roster shall be established and maintained by the Employer in accordance with the operational requirements of the Employer after consultation with the employees to whom the rosters apply.
- (4) The roster shall be posted on each occasion at least 48 hours before it comes into operation, in a convenient place where it can be readily seen by the employees concerned.
- (5) Rostered work outside of the ordinary hours of work shall attract the relevant shift penalties. Unrostered work shall attract the relevant overtime provisions.
- (6) Any dispute concerning rosters may be addressed through the procedures contained in Clause 11. - Dispute Resolution.
- (7) Meal Breaks and Tea Breaks
- (a) An employee shall take one unpaid meal break as near as reasonably practicable to the middle of each rostered shift. Meal breaks shall be not less than 30 minutes and not more than 90 minutes in duration. Travelling time taken to reach the staff facility at which the meal break is taken shall not exceed 10 minutes including "wash-up" time between the time of downing tools and commencing the meal break. Travelling time taken to return to the job and commence work after the completion of the meal break shall not exceed 5 minutes.

- (b) An employee may take one paid refreshment break prior to the unpaid meal break and one paid refreshment after the unpaid meal break. Refreshment breaks shall be taken on the job or at the staff facility closest to the location the employee is working and, in any event, shall not exceed 10 minutes including "wash-up" time between the time of downing tools and resuming work.
- (c) An employee may determine the commencement time of refreshment breaks and the time and duration of the meal break provided that the timing and/or duration of the breaks do not interrupt the near completion of work, interfere with the completion of urgent work, interfere with the rectification of a breakdown of plant, or interfere with routine maintenance of plant which can only be done while such plant is idle.
- (d) Notwithstanding paragraph 7(c) the Employer may from time to time roster meal and refreshment breaks if it is necessary for work to continue uninterrupted. Where the Employer so rosters the meal and refreshment breaks and an employee works in excess of six hours without a meal break the employee shall be paid at overtime rates for the time worked in excess of six hours, until released from duty to commence the meal break.
- (8) Nothing in this Award shall prevent the Parties from agreeing to alternative arrangements to regulate ordinary hours of work and rostering.
- (9) Notwithstanding the provisions of this clause ordinary hours of work may, by agreement between the Employer and employees, be worked as rostered in accordance with one of the following cycles:
- (a) **Nine day fortnight**  
Actual hours of 76 hours as rostered over nine days per fortnight with the tenth day to be taken as an unpaid rostered day off. The following provisions shall apply to an employee working under this arrangement:
- (i) **Rostered Day Off**  
Each employee shall be allowed 1 rostered day off each fortnight in accordance with a roster prepared by the Employer showing days and hours of duty and rostered days off for each employee.  
A rostered day off shall be the first or last day of the week unless otherwise agreed between the Employer and employee.
- (ii) **Annual Leave and Public Holidays**  
A four week annual leave entitlement is equivalent to 152 hours, the equivalent of eighteen rostered working days of 8 hours 27 minutes, and 2 rostered days off.  
For the purposes of annual leave, a day shall be credited as 8 hours 27 minutes.
- (iii) **Overtime**  
The provisions of the relevant overtime clause, shall apply for work performed prior to an employee's nominated starting time and after an employee's nominated ceasing time, as rostered.
- (iv) **Study Leave**  
Credits for Study Leave shall be given for educational commitments falling due between an employee's nominated starting and finishing times.
- (b) **Nineteen day month**  
Actual hours of 152 hours as rostered over four weeks with the twentieth day to be taken as an unpaid rostered day off. The following provisions shall apply to an employee working under this arrangement:
- (i) **Rostered Day Off**  
Each employee shall be allowed one rostered day off each 4 week cycle in accordance with a roster prepared by the Employer showing days and hours of duty and rostered days off for each employee.  
A rostered day off shall be the first or last day of the week unless otherwise agreed between the Employer and employee.
- (ii) **Leave and Public Holidays.**  
A 4 week annual leave entitlement is equivalent to 152 hours, the equivalent to 19 rostered working days of 8 hours, and one rostered day off.  
For the purposes of annual leave, a day shall be credited as 8 hours.
- (iii) **Overtime**  
The provisions of the relevant overtime clause, shall apply for work performed prior to an employee's nominated starting time and after an employee's nominated ceasing time, as rostered.
- (iv) **Study Leave**  
Credits for Study Leave shall be given for educational commitments falling due between and employee's nominated starting and finishing times.
- (c) The Employer shall not withdraw from an agreement for ordinary hours to be worked in accordance with this subclause without prior consultation pursuant to Part 2 Communication, Consultation and Dispute Resolution of this Award.
- (10) **Flexitime**  
Notwithstanding the provisions of this clause, flexitime may be worked by agreement between the Employer and Employee/s. All provisions of the Award continue to apply except where inconsistent with these provisions.
- (a) The working of flexitime arrangements shall be subject to the following:
- (i) The Employer shall be responsible for authorising a flexitime roster. The roster shall indicate minimum staffing requirements, any parameters relating to starting and finishing times, lunch break coverage and flexileave, the minimum operation parameters (MOP's).
- (ii) The MOP's shall be prepared after consultation with the employee's to whom the roster applies.
- (iii) Subject to paragraph (ii), MOP's may be varied to accommodate operational requirements.

- (b) Subject to there being work available to be done and subject to the employee being capable of undertaking the available work, an employee may select their own starting and finishing times within the parameters from time to time specified by the Employer. In the absence of such specification the following parameters shall apply:
- (i) Commencement of shift: 0600 to 0930 hours.
  - (ii) Minimum lunch break of 30 minutes to be taken within 6 hours of commencing work on any day.
  - (iii) End of Shift: 1500 to 1930 hours.
- (c) Hours of Duty
- The ordinary hours of duty may be an average of 8 hours and 30 minutes per day, which may be worked with flexible commencement and finishing times in accordance with this clause, provided that:
- (i) An average of 38 hours per week shall be worked.
  - (ii) The maximum number of hours that can be worked on any day shall be 10 hours.
  - (iii) The minimum number of hours that can be worked on any day shall be 4 hours.
  - (iv) At no point shall credit hours exceed 76 hours.
  - (v) At no point shall debit hours exceed 15 hours and 12 minutes.
  - (vi) The ordinary hours of duty shall be worked on Monday to Friday, unless agreed otherwise from time to time.
  - (vii) The settlement period shall be 4 weeks, commencing at the beginning of a pay cycle.
- (d) Credit Hours
- (i) Credit hours worked in excess of the average of 38 hours per week to a maximum of 76 hours, are permitted at the end of each settlement period. Credit hours shall be carried forward to the next settlement period.
  - (ii) Where an employee has credit hours in excess of 76 hours at the end of a settlement period, the employee shall have one settlement period to reduce the credit hours to 76 hours. If the employee does not reduce the credit hours to at least 76 hours within the settlement period, the Employer may roster the employee off duty during the subsequent settlement period to bring credit hours down to 76 hours.
  - (iii) Where the credit hours of an employee are regularly in excess of 76 hours, the Employer may require the employee to revert to working rostered shifts.
  - (iv) Ordinarily, credit hours shall be accessed as half days or single days off.
  - (v) Employees shall be able to nominate the days upon which they shall access their credit time, provided the nominated days accommodate the MOP's and provided the nominated days may be cancelled by the Employer in response to operational necessity.
  - (vi) The maximum number of days (or equivalent half days) which may be taken off in any settlement period shall be 4 days (inclusive of days taken off by way of the nine day fortnight), except by agreement.
- (e) Debit Hours
- (i) Debit hours below the required average of 38 hours per week to a maximum of 15 hours and 12 minutes are permitted at the end of a settlement period. Debit hours shall be carried forward to the next settlement period.
  - (ii) Where an employee has debit hours in excess of 15 hours and 12 minutes, the employee shall have one settlement period to reduce the debit hours to at least 15 hours and 12 minutes. If the employee does not reduce the debit hours to at least 15 hours and 12 minutes within the settlement period, the Employer may roster the employee on duty for the regular rostered day off without penalty to the Employer, to bring debit hours up to 15 hours and 12 minutes.
  - (iii) Where the debit hours of an employee are regularly in excess of 15 hours and 12 minutes, the Employer may require the employee to revert to working rostered shifts.
- (f) Termination of Employment
- (i) Once an employee tenders notice of resignation, the employee shall not work additional credit hours, other than where the employee's hours are in debit, except by agreement. Credit hours accrued after notice of resignation is tendered shall not be paid out to an employee, except where the hours are worked by agreement.
  - (ii) On termination, credit hours to a maximum of 76 hours shall be paid out. Credit hours in excess of 76 shall only be paid out in the instance where the employee has not been allowed by the Employer to clear it during the notice period.
  - (iii) On termination, debit hours shall be deducted from the employee's final pay.
- (g) Rostered Shifts
- (i) Where an employee has been instructed to work a rostered shift, the appropriate overtime provisions shall apply after 8 hours and thirty minutes of ordinary hours of work are worked on any day.
  - (ii) An employee shall be given not less than 48 hours notice by the Employer of the requirement to work a rostered shift.
  - (iii) Where less than the required notice is provided, an employee shall be credited with one additional hour of credit.
  - (iv) Notwithstanding the provisions of this subclause, the Employer shall endeavour to provide staff with as much notice as possible of the requirement to work a rostered shift.

- (h) All employees are required to record their daily hours of work on flex sheets. At the end of each settlement period, flex sheets are to be verified by the Supervisor. Flex sheets shall be kept in a central location. Past flex sheets shall be maintained by the Department and available for inspection by any person authorised to inspect them.
- (i) Nothing in this Clause shall alter the employers pre-existing rights to determine work arrangements and the manner in which work is undertaken to suit the operational requirements of the employer, including the making of provisions for attendance of employees for duty on Saturday's, Sunday's or Public Holiday's, the performance of shift work or the cancellation of flexible working hours, as provided for by the Award.
- (j) For the purposes of this clause:  
"Rostered shift" shall mean any shift of 8 hours and 30 minutes of ordinary hours, the starting and finishing times of which are specified by the Employer, which the Employer instructs the employee to work.

25. - OVERTIME

- (1) Overtime Rate.
  - (a) Work required by the Employer to be performed outside of the ordinary hours of work, shall be paid for at the overtime rates of:
    - (i) Double time and a half when carried out on a public holiday;
    - (ii) Double time when carried out after 1200 hours on a Saturday, or any time on a Sunday; or
    - (iii) Time and a half for the first 2 hours and double time thereafter at any other time.
  - (b) Overtime on shift work shall be based on the rate payable for shift work.
  - (c) On the request of an employee, the Employer may grant time off in lieu of payment for overtime. Time of in lieu shall be proportionate to the payment to which the employee is otherwise entitled.
  - (d) The allocation of overtime shall not be made on the basis of an employee's preference for payment or time off in lieu.
- (2) The provisions of this clause do not operate so as to require payment of more than double time rates, or double time and a half on a holiday prescribed under this Award.
- (3) Each day stands alone in calculating overtime but if overtime continues beyond midnight on any day, time worked after midnight shall be deemed part of the previous day's work.
  - (a) An employee on overtime duty is entitled, where practicable, to have a minimum break of 10 hours before recommencing work on successive days.
  - (b) An employee shall be paid at ordinary time for any rostered ordinary hours which fall while a 10 hour break is being observed.
  - (c) Where an employee is directed by the Employer to recommence work after less than a ten hour break, the employee shall be paid at the rate of double time thereafter until released from duty. The employee shall be entitled to be absent until 10 hours off duty are observed.
  - (d) For shift employees the period of ten hours shall be reduced to 8 hours when overtime worked:
    - (i) is due to a private arrangement between employees, or
    - (ii) is due to a shift employee not reporting for duty, or
    - (iii) is for the purpose of changing shift rosters.
  - (e) This subclause does not apply where overtime is worked as a result of a recall and actual time worked is less than three hours on such recall or on each of such recalls.
  - (f) This subclause shall not apply to casuals.
- (4) An employee who is recalled to work after leaving the workplace at the end of the shift shall be paid a minimum of 3 hours at the relevant overtime rates. Time reasonably spent in getting to and from work shall be counted as time worked. An employee shall be paid in excess of the minimum of 3 hours where the addition of the time worked and the time spent travelling to and from work exceeds a total of 3 hours.
- (5) Employees in areas as agreed between the parties may be rostered for stand by duty outside of the ordinary hours of work. In addition to any payment due under this Award for any overtime worked, each employee rostered for stand by duty shall be paid -
  - (a) 3 hours pay at ordinary rates if rostered on any day Monday to Friday inclusive or if stand by rates are applicable on a rostered day off.
  - (b) 4 hours pay at ordinary rates if rostered on a Saturday or a Sunday.
  - (c) 3 hours pay at ordinary rates plus a day in lieu if rostered on a holiday.

Provided that alternative arrangements may be agreed upon in writing, between the parties.
- (6) Work on a Rostered Day Off
  - (a) An employee required to work on a rostered day off shall be re-rostered for another day off at a mutually convenient time, in lieu of overtime rates prescribed in this clause.
  - (b) Provided that, should the Employer and employee so agree, the time involved may be treated and paid as overtime in accordance with the other provisions of this clause.
  - (c) Provided further, that the employee shall be paid in accordance with the call out provisions of this subclause where called out on a rostered day off and required to work for less than 1 complete day.
- (7) Meal Breaks During Overtime
  - (a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of \$9.60 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to an employee notified on the previous day of the requirement to work such overtime.

- (b) Where an employee so notified provides themselves with a meal and subsequently is not required to work overtime or is required to work less overtime than the period notified, the employee shall be paid for each meal provided and not the required amount prescribed in paragraph 7(a).
- (8) Overtime for Apprentices
- (a) Apprentices under 18 years of age shall not be required to work overtime or shift work unless the employee so desires.
- (b) Apprentices shall not, except in an emergency, work or be required to work overtime or shift work at times which would prevent attendance at Technical School, as required by any statute, award or regulation applicable to the apprentice.
- (9) When an employee, after having worked overtime and/or shifts for which the employee has not been regularly rostered, finishes work at a time when reasonable means of transport are not available, the Employer shall provide conveyance to the employee home or the nearest public transport.
- (a) The Employer may require any employee to work reasonable overtime at overtime rates.
- (b) Unions party to this Award, and/or employees covered by this Award, shall not in any way, directly or indirectly, be a party to or concerned in any ban, limitation, or restriction upon the working of overtime in accordance with the requirements of this paragraph.

#### 26. - SHIFT WORK

- (1) Notwithstanding any other provision of this Award, shift work may be worked as rostered, but where the shift work is to be regular rostered shiftwork, the Employer shall notify the relevant Union party to this Award.
- (2) Shift Penalties
- (a) For the purposes of this subclause:-
- (i) "Afternoon shift" shall mean a shift which commences at or after 1200 hours and before 1800 hours.  
Provided that an afternoon shift shall not mean a shift which commences at or after 1200 hours and is completed at or before 1800 hours on that day.
- (ii) "Night shift" shall mean a shift which commences at or after 1800 hours and before 0600 hours
- (b) Shift Penalty Rates
- (i) An employee when working on afternoon shift shall be paid a loading of 15% of the hourly rate for the classification in which the employee is employed.
- (ii) An employee when working on night shift shall be paid a loading of 20% of the hourly rate for the classification in which the employee is employed.
- (3) Subject to the provisions of this Award all work performed on a rostered shift, when the major portion of the shift falls on a Saturday, Sunday or a public holiday, shall be paid for as follows :-
- (a) Saturday - at the rate of time and one half
- (b) Sunday - at the rate of time and three quarters
- (c) Public Holidays - at the rate of double time and a half
- (d) These rates shall be paid in lieu of the shift allowance prescribed in subclause (2) of this clause.
- (4) Where an employee who is not regularly rostered to work afternoon, night or public holiday shifts, but is occasionally required to work such shifts, these shifts shall attract the following penalty rates:
- (a) Monday to Friday - at the rate of time and one half for the first 2 hours and double time thereafter.
- (b) Saturday and Sunday - at the rate of double time.
- (c) These penalty rates shall be paid in lieu of the shift allowance prescribed in subclause (2) and subclause (3) of this clause.

This provision does not apply to a regular shift worker who works in accordance with a defined roster.

- (5) Time worked in excess of the ordinary working hours shall be paid for at ordinary rates:
- (a) If it is due to private arrangements between the employees themselves; or
- (b) If it does not exceed two hours and is due to a relieving person not coming on duty at the proper time; or
- (c) If it is for the purpose of effecting the customary rotation of shifts.

#### Shift Rostering

- (a) Broken shifts shall not be worked
- (b) An employee changing to or from night and day duty will be free from duty during the twenty hours immediately preceding the commencement of the changed duty.
- (c) Each employee will be free from duty for not less than two full days in each week or four full days in each fortnight. Where practicable, days off will be consecutive and will not be preceded by a night shift unless the employee is rostered to work an evening or night shift immediately following rostered days off.
- (d) An employee changing from evening duty to day duty will not be required to commence until a period of 9.5 hours has elapsed since ceasing evening duty.
- (e) An employee other than one engaged to work part-time will not be required to work a combination of shifts exceeding all night, day or evening shifts or both day and evening shifts in either the first or second week of the roster.

- (f) The employee's roster of working hours will be exhibited and will be readily available to employees and/or their nominated representative.
- (g) Where practicable, an employee's ordinary hours of work will not be rostered over more than 6 consecutive days. No employee will be rostered to work more than ten duties over a fortnightly period. In the case of employees working ten-hour night shifts a maximum of five consecutive shifts may be worked unless the employee requests and the employer approves such a request. No employee will be required to work more than eight ten hour shifts in any one fortnightly period.

## **PART 6 - LEAVE OF ABSENCE AND PUBLIC HOLIDAYS**

### 27. - CASUAL EMPLOYEES

Casual employees are not entitled to paid leave under this Part.

### 28. - PUBLIC HOLIDAYS.

- (1) Prescribed Public Holidays.
  - (a) New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day shall be paid public holidays.
  - (b) Any additional public holidays proclaimed under Section 7 of the Public and Bank Holidays Act, 1972 shall be observed as public holidays.
- (2) When a paid public holiday falls on a Saturday or Sunday, the holiday shall be observed on the next Monday.
- (3) When Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next Tuesday.
- (4) In each case the substituted day shall be a paid holiday and the day for which it is substituted shall not be a holiday.
- (5) Payment for Public Holidays.
  - (a) An employee not required to work on a day solely because the day is a public holiday shall be paid for the ordinary hours that the employee would have worked as if the day had not been a public holiday.
  - (b) Payment for holidays shall be in accordance with the usual hours of work.
- (6) All hours worked on a public holiday shall be paid at the rate of double time and a half of the ordinary rate of pay or if an employee chooses, the employee shall be paid at the rate of time and a half of the ordinary rate of pay and time off in lieu credits shall be increased by the equivalent of the time worked.
- (7) Public Holidays Falling on Days Off.
  - (a) Where a public holiday falls on a rostered day off or a day off duty as prescribed in Clause 24. - Hours of Work and Rostering, a day off shall be observed in lieu of the public holiday at a mutually convenient time.
  - (b) If a public holiday falls on an employee's rostered day off or falls on an employee's day off duty, the employee's time off in lieu credits shall be increased by the number of hours that would ordinarily have been worked if that day had been an ordinary working day.
- (8) In exceptional circumstances, where an employee so requests and with the agreement of the Employer, employee and the relevant Union, time off in lieu credits accumulated under this clause may be paid out.
- (9) When an employee is absent on leave without pay, sick leave without pay or workers' compensation, any day observed as a public holiday falling during the absence shall not be treated as a paid holiday. If the employee is on duty or available on the whole of the working day immediately preceding a public holiday or on the whole of the working day immediately following a day observed as a public holiday, the employee shall be paid for such holiday.
- (10) A part-time employee shall not be entitled to payment for any public holiday referred to in this clause if not so rostered to work on that holiday.
- (11) Nothing in this award shall prevent the Parties from agreeing alternative arrangements for the taking of public holidays.

### 29. - ANNUAL LEAVE

- (1) Employees shall receive 20 days of paid annual leave, excluding public holidays, for each period of 12 months continuous service.
- (2) An additional 5 days of paid annual leave shall be granted:
  - (a) To a shift employee regularly rostered to work on Sundays and public holidays.
  - (b) To a continuous shift worker.

Provided that where an employee is rostered in this manner for only part of the 12 month qualifying period, this entitlement shall accrue at the rate of 3.65 hours of pay for each completed week the employee is continuously so engaged, and this accrual shall be in lieu of the leave accrual granted by subclause (3).
- (3) Employees annual leave entitlement shall accrue pro rata on a weekly basis, being 2.92 hours pay per week of continuous service, and be cumulative from year to year.
- (4) With the Employer's agreement, an employee may be allowed to take annual leave before it has accrued.
- (5) Annual leave shall be taken at times agreed between the employee and the Employer. In reaching such agreement equal consideration shall be given to the needs of the employee and the operational convenience of the Employer.
- (6) Employees shall be entitled, after the end of each period of 12 months continuous service and before the completion of the subsequent period of 12 months continuous service, to take annual leave in one continuous period of 4 weeks or in two separate periods of not less than 2 weeks on each occasion.
- (7) If the Employer and the employee agree annual leave may be taken in any number of periods of not less than 1 day on each occasion.
- (8) Should any public holidays fall within an employee's period of annual leave, the holiday or holidays, as the case may be, shall be added to the period of annual leave.

- (9) Employees shall take unused annual leave accrued during a period of 12 months continuous service before the completion of the subsequent period of 12 months continuous service, if required by the Employer on the giving of reasonable notice.
- (10) An employee shall be paid when on leave the rate of pay the employee received for the greatest proportion of the calendar month prior to taking the leave.
- (11) An employee shall be paid for each period of annual leave at the time of taking the leave, if the employee so elects.
- (12) The annual base salaries prescribed in this Award incorporate a commuted allowance which is in substitution for leave loading. Leave entitlements utilised during the life of this Award, including credits accrued prior to the commencement of this Award, shall not otherwise attract leave loading.
- (13) Nothing in this Award shall prevent an employee, with the consent of the Employer, from accumulating and carrying forward any portion of the employee's annual leave entitlements from one year to the next.
- (14) The Employer shall not unreasonably withhold consent for the accumulation of up to 40 days of paid annual recreation leave for the purpose of taking extended leave in a particular year.
- (15) Annual leave shall continue to accrue during periods of annual leave, public holidays, long service leave and authorised sick leave (paid or unpaid) provided that:
  - (a) In the case of long service leave, only for up to a maximum period of absence of 3 months, but where long service leave on half pay is taken, annual leave shall accrue proportionally over any period of leave which does not exceed the equivalent of 3 months on full pay.
  - (b) In the case of sick leave, only for up to a maximum period of absence of 3 months.
- (16) Approved periods of absence from work through Workers Compensation shall not interrupt continuity of service, but annual leave shall accrue during the first 6 months only of any such absence.
- (17) Annual Leave Pay out or Recovery on Termination.
  - (a) Any accrued and pro-rata leave which has not been taken shall be paid on termination of employment.
  - (b) Pro-rata leave shall not be paid where employment is terminated for misconduct or other grounds that justify summary dismissal.
  - (c) If at termination an employee has taken more leave than has been accrued, the employee shall pay back that leave. The Employer may deduct any money owing from the employee's final pay.
- (18) An employee who works an average of a 38 hour week and who accumulates a rostered day off, shall be required to take one period of annual leave to include a rostered day off duty. The rostered day off duty shall not attract additional pay or leave in lieu of that rostered day off.
- (19) In addition to the leave prescribed in this clause, employees working north of 26 degrees south latitude shall receive an additional five working days annual leave on the completion of each year of continuous service in the region. Annual leave loading is not payable on this additional leave.

### 30 - LEAVE OPTIONS

- (1) Notwithstanding the terms specified elsewhere in this Award, the leave options specified in this Clause are available to employees.
- (2) To exercise one or more of the options specified in this clause, an employee must make written application in the manner prescribed by the employer.
- (3)
  - (a) At the request of an employee an employer may agree to an arrangement ("the arrangement") whereby the employee accrues either 1 (51/52), 2 (50/52), 3 (49/52) or 4 (48/52) weeks additional annual leave in lieu of salary of the equivalent value. Both the agreement to the arrangement and the time at which the additional leave is taken will be dependant on the operational requirements of the department where the employee works at the particular time.
  - (b) Unless otherwise agreed between the employee and the employer, an employee who enters into an arrangement under this subclause does so in blocks of 12 months. Further, it will be assumed that, an employee having entered into the arrangement, the arrangement will be continuing from year to year unless the employer is otherwise notified in writing by the employee.
  - (c) For the purposes of this subclause and without limiting the meaning of the term, "operational requirements" may include:
    - (i) The availability of suitable leave cover, if required;
    - (ii) The cost implications;
    - (iii) The impact on client/patient service requirements; and
    - (iv) The impact on the work of other employees.
  - (d) The portion of the employee's salary to be forfeited shall be calculated as a fortnightly amount and their fortnightly salary shall be decreased by that amount for the duration of the arrangement.
  - (e) All annual leave taken during the course of the arrangement shall be paid at the reduced rate.
  - (f) The additional annual leave shall continue to accrue while the employee is on leave during the course of the arrangement.
  - (g) The reduced salary shall be used for all purposes during the course of the arrangement.
  - (h) The additional leave shall not attract leave loading.
- (4) Double the leave on half pay

Subject to operational requirements as defined in subclause (3) of this clause, and with the agreement of the employer, an employee may elect to take twice the period of any portion of their annual leave, including any time in lieu taken as leave, at half pay.

- (5) Less Leave, more pay.
- (a) Unless otherwise agreed by the employer, arrangements under this subclause shall be for periods of 12 months.
- (b) Provided that at the commencement of each 12 month block of this arrangement an employee has a minimum of four weeks of annual and/or long service leave available to be taken in that year, the employee may opt to forfeit the accrual of 1 or 2 weeks annual leave in favour of receiving additional salary to the equivalent value of the leave that has been forfeited ("the arrangement").
- (c) The increased salary shall be used for all purposes during the course of the arrangement, apart from calculating the contributions to superannuation.
- (6) It is the responsibility of the employee to investigate the impact of any of the arrangements under this clause on her/his allowances, superannuation and taxation, and the options, if any, available for addressing these.

### 31 - SICK LEAVE

- (1) Employees shall receive 10 days of paid sick leave for each period of 12 months continuous service.
- (2) The sick leave entitlement shall accrue pro rata on a weekly basis and be cumulative from year to year.
- (3) To be granted paid sick leave, the employee must advise the Employer as soon as reasonably practicable of the inability to attend for work, the nature of the illness or injury and the estimated period of absence. This advice shall be provided within 24 hours of commencement of the absence, other than in extraordinary circumstances.
- (4) Any absence on sick leave of more than 2 consecutive days, shall be supported by evidence that satisfies the Employer that the absence from work was on account of personal illness or injury.
- (5) The total number of absences on sick leave, which are not supported by evidence that satisfies the Employer that the absence from work was on account of personal illness or injury, shall not exceed 5 days in any particular accrual period.
- (6) Payment for sick leave may be adjusted at the end of each accruing year, or at the time the employee leaves the service of the Employer, in the event of the employee being entitled by service subsequent to the sickness in that year to a greater allowance than that made at the time the sickness occurred.
- (7) In the event of prolonged or repetitive absence on sick leave, the Employer may require an employee to provide a report on their health status from a registered medical practitioner, or be examined by a registered medical practitioner selected by agreement between the Employer and the employee. The fee for any such examination shall be paid by the Employer.
- (8) If an employee provides satisfactory medical evidence that the employee was restricted to a hospital or the employee's place of residence for 7 consecutive days or more whilst on paid leave, the Employer shall grant the employee paid sick leave, up to the limit of the employee's accrued entitlement, and leave credits equivalent to the paid sick leave granted shall be reinstated. Replaced annual leave shall be taken at the rate of wage applicable at the time the leave is subsequently taken.
- (9) The provisions of this clause, with respect to payment, do not apply for any period in which the employee is entitled to payment under the Workers' Compensation Act or where illness or injury is the result of the employee's own misconduct.
- (10) Sick leave shall not be granted in substitution for a rostered day off duty.
- (11) An employee who accrues time towards a rostered day off, shall have sick leave debited on the basis of the ordinary hours which would have been worked each day by the employee and shall accrue the usual entitlement towards the day off.
- (12) An employee entitled to paid sick leave shall be granted the leave without loss of ordinary pay.
- (13) For the purposes of this clause a certificate issued by a registered medical practitioner or a registered dentist shall satisfy the Employer that the certified absence from work was on account of personal illness or injury.

### 32 - LONG SERVICE LEAVE

- (1) Employees shall receive a cumulative entitlement to 13 weeks paid long service leave after 10 years' continuous service; and after each further 7 years' continuous service.
- (2) Long service leave shall be taken at times agreed between the employee and the Employer. In reaching such agreement equal consideration shall be given to the needs of the employee and the operational convenience of the Employer.
- (3) Employees shall be entitled, after the end of each accrual period and before the completion of the subsequent accrual period, to take long service leave in one continuous period of 13 weeks.
- (4) Employees shall take long service leave within 3 years of the date the leave is accrued unless the Employer agrees otherwise.
- (5) An employee, by agreement, may choose to take long service leave as an entitlement to 26 weeks of leave at half pay. In calculating the rate of pay to apply in such an instance, the provisions of subclause (14) of the General Order, referred to in subclause (13) hereof, shall apply.
- (6) If the Employer and the employee agree long service leave may be taken in any number of periods not less than 1 week on each occasion.
- (7) A public holiday occurring during a period of long service leave is part of the long service leave and an extra day in lieu shall not be granted.
- (8) In this clause "continuous service" includes any period during which an employee was absent on approved paid leave, and any service with the Employer immediately prior to this Award having effect.
- (9) In this clause "continuous service" does not include any periods exceeding 4 weeks, on each occasion, during which an employee was absent on leave without pay or parental leave or any other absence during which the employee was not paid, however such leave shall not be deemed to break service.
- (10) In this clause "continuous service" does not include any periods during which an employee was absent on long service leave which had accrued prior to 1 April 1974.
- (11) If an employee is retired by the Employer on the grounds of ill health or for any other cause and the employee has completed at least 12 months continuous service the employee shall be paid out pro-rata long service leave.

- (12) Pro-rata long service leave shall be paid out to an employee's estate or any other person nominated by the employee in writing, in the event of the employee's death, if the employee has completed at least 12 months continuous service.
- (13) Subject to the provisions of this clause the long service leave provisions set out in Volume 66 of the Western Australian Industrial Gazette, at pages 319 to 321 inclusive, shall apply to employees covered by this Award.

### 33. - TRAINING LEAVE.

- (1) The Employer shall provide an employee with study assistance in the form of leave with pay to undertake part-time study that is relevant to the duties being or likely to be performed by an employee, is relevant to the current and emerging needs of the Employer, enhances their career development, and does not unduly affect or inconvenience the operations of the Employer.
- (2) Study leave with pay shall be for formal study periods only and an employee shall undertake at least 50% of formal study in their own time. An employee shall provide evidence that satisfies the Employer as to their attendance and satisfactory progress with studies. The maximum amount of paid study leave shall be 160 hours within a 12 month period for a full-time employee and pro rata for a part-time employee.
- (3) Nothing in this Award shall prevent the Employer from agreeing to alternative arrangements for utilising this entitlement to leave with pay for study purposes or for structured trade training.

### 34. - UNION REPRESENTATIVES

- (1) Subject to the recognition of properly constituted authority, Union delegates appointed by the Union shall be recognised by the Employer. The Employer shall be notified in writing by the Union of the delegates appointed.
- (2) The Employer shall grant paid leave during ordinary working hours to an employee:
- who is required to give evidence before any Industrial Tribunal;
  - who as a Union nominated representative of the employees is required to attend negotiations and/or conferences between the Union and Employer;
  - when prior agreement between the Union and Employer has been reached for the employee to attend official Union meetings preliminary to negotiations or industrial hearings;
  - who as a Union nominated representative of the employees is required to attend joint Union/management consultative committees or working parties.
- (3) Trade Union Training.
- An employee nominated or nominating to attend trade union training shall be granted up to five (5) days paid leave per annum, by agreement. Up to ten days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten days.
  - A qualifying period of 12 months in Government employment shall be served before an employee is eligible to attend courses or seminars of more than a half day duration, unless otherwise agreed.
- (4) The granting of leave pursuant to subclause (2) of this clause shall only be approved:
- where an application for leave has been submitted by an employee a reasonable time in advance;
  - for the minimum period necessary to enable the union business to be conducted or evidence to be given;
  - for those employees whose attendance is essential;
  - when the operation of the organisation is not being unduly affected and the convenience of the Employer impaired.
- (5) Approval of leave requested pursuant to subclause (3) shall be subject to:
- notice of at least four weeks or a lesser period by agreement, being given to the Employer;
  - the request being made in writing detailing the subject, date, duration, venue and authority conducting the course of the leave and being accompanied by Union authorisation.
  - the operation of the organisation not being unduly affected nor the convenience of the Employer impaired.
- (6) Leave shall be granted at the ordinary rate of pay and, in the case of leave granted pursuant to subclause (3):
- shall not include shift allowances, penalty rates or overtime but shift workers shall be deemed to have worked the shifts they would have worked had they not attended the course for all other purposes of the Award.
  - where a public holiday or rostered day off (including a rostered day off as a result of working a 38 hour week) falls during the duration of a course, a day off in lieu of that day shall not be granted.
- (7) Leave granted shall include any necessary travelling time during working hours.
- (8) The Employer is not liable for any expense incurred by the employee when attending trade union training or union business.
- (9) The provisions of this clause shall not apply when an employee is absent from work without the approval of the Employer.
- (10) Reasonable unpaid leave is available to an employee nominated by the Union to attend to union business in work time, subject to operational requirements.
- (11) Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for union business.

### 35. - DEFENCE FORCE TRAINING LEAVE

- (1) Where an employee is a volunteer member of the Defence Forces or the Cadet Force, leave may be granted for the employee to attend an annual camp of continuous training, additional approved camp or course of instruction, subject to operational requirements and the conditions of this clause.
- (2) Leave Entitlement
- Two weeks of special leave on full pay may be granted in each period of 12 months commencing on 1 July each year.

- (b) If the Officer in Charge of a unit certifies that it is essential for an employee to be at the camp in an advance or rear party, a maximum of four extra days on full pay may be granted in the 12 month period.
- (3) Additional Leave
  - (a) Further leave to attend an additional approved camp or course of instruction may be granted as leave without pay and the difference between civil and Defence Forces pay made up.
  - (b) In calculating Defence Forces pay for additional camps or courses, weekends and holidays should be excluded so that employees shall have the benefit of any pay with respect of these days. Evidence of the necessity to attend extra camps or courses of instruction shall be provided to the Employer.
- (4) Employees who are members of the Defence Forces and the Cadet Force may only be granted leave for attendance at one annual camp of continuous training and one additional approved camp or course of instruction.

#### 36. - WITNESS AND JURY SERVICE

- (1) Notification
  - (a) An employee required to serve on a jury shall, as soon as possible after being summonsed to serve, notify the Employer.
  - (b) The summons to serve must be produced when making application to obtain leave for jury service.
- (2) Leave Entitlement
  - (a) An employee required to serve on a jury shall be granted leave of absence by the Employer, without loss of pay, but only for the period required to enable the employee to carry out his/her duties as a juror.
  - (b) An employee shall not claim fees for jury service and any fees paid to an employee for jury service shall be paid to the Employer.
  - (c) Where jury service is required while an employee is on any form of paid leave, such leave shall not be reinstated.
- (3) An employee must return to duty immediately upon being discharged from jury service, if such release occurs during normal working hours.
- (4) An employee shall provide evidence of attendance at jury service, the duration of such attendance, and the amount received in respect of such service, to the Employer.
- (5) The conditions specified in subclauses (1) to (4) hereof shall also apply where an employee is required as a crown witness during normal working hours.
- (6) An employee subpoenaed or called as a witness under any other circumstances other than specified in subclauses (1)(a) and (5), shall be granted leave of absence without pay except when the employee makes an application to use accrued leave in accordance with Award provisions.

#### 37. - BEREAVEMENT LEAVE

- (1) Employees shall receive a non - cumulative entitlement to paid bereavement leave of up to 2 days on the death of a family member. Provided that the Employer may exercise a discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.
- (2) The 2 days need not be consecutive.
- (3) The Employer may require evidence that satisfies the Employer as to the death that is the subject of the leave sought and the employees relationship to the deceased person.
- (4) Payment in respect of bereavement leave is to be made only where the employee otherwise would have been on duty and shall not be granted where the employee concerned would have been off duty in accordance with his roster, or on long service leave, annual leave, sick leave, workers' compensation, leave without pay, public holiday, or a special day off.
- (5) Bereavement leave shall not be granted in substitution for a rostered day off duty, however an employee on bereavement leave shall continue to accrue an entitlement towards a rostered day off.
- (6) For the purposes of this clause "family member" has the same meaning as defined in Clause 39 – Family Leave.

#### 38 - PARENTAL LEAVE

- (1) Definitions
  - "Employee" includes full time, part time, permanent and fixed term contract employees.
  - "Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The employer may require confirmation of primary care giver status.
  - "Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.
  - "Partner" means a person who is a spouse or de facto partner.
  - "Public sector" means an employing authority as defined in s5 of the *Public Sector Management Act 1994*.
- (2) Entitlement to Parental and Partner Leave
  - (a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:
    - (i) birth of a child to the employee or the employee's partner; or
    - (ii) adoption of a child who is not the natural child or the stepchild of the employee or the employee's partner; is under the age of five (5); and has not lived continuously with the employee for six (6) months or longer.
  - (b) An employee identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to six (6) weeks paid parental leave. Paid parental leave will form part of the 52 week entitlement provided in subclause (2)(a).
  - (c) A pregnant employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.

- (d) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed six (6) weeks.
- (e) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.
- (f) Parental leave may not be taken concurrently by an employee and his or her partner except under special circumstances and with the approval of the employer.
- (g) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.
- (h) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave. When proceeding on paid parental leave an employee is entitled to receive allowances only in the same manner as they would when proceeding on annual leave. Annual leave loading and shift and weekend penalty payments are not payable whilst on paid parental leave.
- (i) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.
- (j) Partner Leave  
An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.
- (k) Birth of a child
  - (i) An employee shall provide the employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner confirming the pregnancy and the estimated date of birth.
  - (ii) If the pregnancy results in other than a live child or the child dies in the six weeks immediately after the birth, the entitlement to paid parental leave remains intact.
- (l) Adoption of a child
  - (i) An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.
  - (ii) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.
- (3) Other leave entitlements
  - (a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.
  - (b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The employer's approval is required for such an extension.
  - (c) Any period of leave without pay must be applied for and approved in advance and will be granted on a year by year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave will not exceed two (2) years.
  - (d) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in (3)(a) and (3)(f).
  - (e) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.
  - (f) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.
- (4) Notice and Variation
  - (a) The employee shall give not less than four (4) weeks notice in writing to the employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.
  - (b) An employee seeking to adopt a child shall not be in breach of subclause (4)(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.
  - (c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.
- (5) Transfer to a Safe Job  
Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the pregnant employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.
- (6) Replacement Employee  
Prior to engaging a replacement employee the employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

- (7) Return to Work
- (a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four (4) weeks prior to the expiration of parental leave.
  - (b) Where an employer has made a definite decision to introduce major changes that are likely to have a significant effect on the employee's position the employer shall notify the employee while they are on parental leave.
  - (c) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.
  - (d) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time provisions of the relevant award and agreement.
  - (e) Subject to the employer's approval an employee who has returned on a part time basis may revert to full time work at the same classification level within two (2) years of the recommencement of work.
- (8) Effect of Parental Leave on the Contract of Employment
- (a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.
  - (b) Paid parental leave will count as qualifying service for all purposes under the relevant award and agreement. Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose under the relevant award and agreement.
  - (c) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the relevant award and agreement.
  - (d) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on parental leave but otherwise the rights of the employer in respect of termination of employment are not affected.

#### 39. - FAMILY LEAVE

- (1) An employee may use in each calendar year up to 5 days of the sick leave with pay entitlements the employee accrued in previous years of service, to care for a family member or a member of the employee's household who is ill and who requires the employee's immediate care and attention during the period of illness. Provided that the Employer may exercise a discretion to grant family leave to an employee in respect of some other person with whom the employee has a special relationship.
- (2) Subject to subclause (3) "family member" means:
  - (a) a spouse or former spouse;
  - (b) a child, sibling or parent; and
  - (c) a child, sibling or parent of a spouse or former spouse
- (3) Where the context reasonably permits, the term "step" or "defacto" or "grand" may be applied as a prefix to the words "spouse", "child", "sibling", and "parent" to extend the scope of the definition of "family member".
- (4) "Spouse" includes defacto spouse.
- (5) "Member of the employee's household" means a person who resides with the employee.
- (6) An employee who does not have accrued sick leave with pay entitlements sufficient to take 5 days family leave during a calendar year shall be entitled to use up to 5 days of annual recreational leave for family leave purposes
- (7) Absence from work on Family Leave shall be supported by evidence that satisfies the Employer that the person is ill, the employee's relationship to the ill person and the need for the employee to provide the ill person with immediate care and attention.
- (8) Family leave is not cumulative from year to year.

#### 40. - PAID LEAVE FOR ENGLISH LANGUAGE TRAINING.

- (1) Leave to attend English Language Training (training which is designed to impart an acceptable level of vocational English proficiency) shall be granted, without loss of pay during normal working hours, to employees from a non-English speaking background, who:
  - (a) are unable to meet standards of communication to advance career prospects;
  - (b) constitute a safety hazard or risk to themselves and/or fellow employees; or
  - (c) are not able to meet the accepted production requirements of the Employer.
- (2) Subject to appropriate needs assessment participation in training shall be on the basis of a minimum of 100 hours per employee per year.
- (3) The content and provider of the training shall be agreed between the Employer, Unions and the Adult Migrant Education Service or other approved authority conducting the training, and shall take account of the vocational needs of an employee in respect of:
  - (a) communication, safety and welfare;
  - (b) productivity within his/her current position as well as those positions to which he/she may be considered for promotion or redeployment;
  - (c) issues in relation to training, retraining and multiskilling, award restructuring, industrial relations and safety provisions, and equal opportunity employment legislation.
- (4) The selection of employees for training shall be determined by consultation between the Employer and the appropriate Unions.

41. - SPECIAL LEAVE WITHOUT PAY

Employees may be granted leave without pay provided that the leave does not conflict with operational requirements.

42. - SPECIAL LEAVE WITH PAY

Employees may be granted leave with pay provided that the leave does not conflict with operational requirements.

43. - SABBATICAL LEAVE

- (1) By agreement with the Employer, employees may elect to be paid 80% of their ordinary rate of pay (the reduced ordinary rate of pay) for their ordinary hours of work and for periods of leave during which they would otherwise be entitled to payment at their ordinary rate of pay.
- (2) Employees paid the reduced ordinary rate of pay for their ordinary hours of work and for periods of leave shall accrue on a fortnightly basis sabbatical leave credits calculated at the rate of 20% of their ordinary hours of work and/or periods of leave taken during that fortnight.
- (3) Sabbatical leave credits may, by agreement between the Employer and the employee, be utilised after:
  - (a) 52 weeks of service in one continuous period of 13 weeks leave.
  - (b) 104 weeks of service in one continuous period of 26 weeks leave.
  - (c) 156 weeks of service in one continuous period of 39 weeks leave.
  - (d) 208 weeks of service in one continuous period of 52 weeks leave.
- (4) Absence on sabbatical leave does not break continuity of service but shall not be taken into account when calculating the period of service for any purpose of this Award.
- (5) An employee may elect to have the corresponding leave credits paid in full at the commencement of a period of sabbatical leave or alternatively may elect to be paid on a pro rata basis fortnightly.
- (6) Payment for a period of sabbatical leave shall be calculated on the basis of 80% of the employees ordinary rate of pay as at the date the payment, or payments in the case of an election to be paid fortnightly, is made.
- (7) Notwithstanding any other provision of this Award the period of leave taken and the rate of payment during that period of leave which was initially agreement may be varied by subsequent agreement.
- (8) Notwithstanding any other provision of this Award an employee may elect to use any pro rata entitlement to sabbatical leave in substitution for a corresponding period of parental leave.
- (9) Notwithstanding any other provision of this Award an employee shall be paid out accrued sabbatical leave entitlements if this Award ceases to apply to the employee unless the industrial instrument which then applies provides for an equivalent entitlement.
- (10) Notwithstanding any other provision of this Award and employees ordinary rate of pay for the purposes of Salary Packaging under this Award shall be determined on the basis of the employees reduced ordinary rate of pay.
- (11) Notwithstanding any other provision of this award an employees salary for the purposes of workers compensation payments shall be determined on the basis of the employees ordinary rate of pay and there shall be no accrual towards sabbatical leave during a period in which the employee is entitled to receive workers compensation payments.

44. - EMERGENCY SERVICE LEAVE

- (1) Subject to operational requirements, paid leave of absence shall be granted by the employer to an employee who is an active volunteer member of State Emergency Service, St John Ambulance Brigade, Volunteer Fire and Rescue Service, Bush Fire Brigade or Volunteer Marine Rescue Service, in order to allow for attendances at emergencies as declared by the recognised authority.
- (2) The employer shall be advised as soon as possible by the employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.
- (3) The employee must complete a leave of absence form immediately upon return to work.
- (4) The application form must be accompanied by a certificate from the emergency organisation certifying that the employee was required for the specified period.
- (5) An employee, who during the course of an emergency, volunteers their services to an emergency organisation, shall comply with subclauses 2, 3 and 4 of this clause.

45. - CEREMONIAL AND CULTURAL LEAVE

- (1) Employees are entitled to time off without loss of pay for cultural /ceremonial purposes, subject to agreement between the employer and employee and sufficient leave credits being available.
- (2) Such leave shall include leave to meet the employee's customs, traditional law and to participate in cultural and ceremonial activities.
- (3) Cultural/ceremonial leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from:
  - (a) the employee's annual leave entitlements; or
  - (b) accrued days off or time in lieu.
- (4) Time off without pay may be granted by arrangement between the employer and the employee for cultural/ceremonial purposes.
- (5) The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.
- (6) Cultural/ceremonial leave shall be available to all employees.

46. - DONORS LEAVE

- (1) Subject to operational convenience, an employee shall be granted paid leave for the purpose of donating blood or plasma to approved donor centres.
- (2) (a) Subject to production of appropriate evidence, an employee shall be entitled to up to 5 days paid leave for the purpose of donating an organ or body tissue.

- (b) Provided that where this paid leave is not sufficient and upon the production of a medical certificate, and employee may access their accrued sick leave or other paid leave in order to cover their absence.

#### **PART 7 - TRANSFERS, TRAVELLING AND WORKING AWAY FROM USUAL PLACE OF WORK**

##### 47. - CAR ALLOWANCE.

- (1) Where an employee is required and authorised to use his/her own motor vehicle in the course of his/her duties an employee shall be paid an allowance not less than that provided for in the table set out hereunder. Notwithstanding anything contained in this subclause the Employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.
- (2) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.
- (3) A year, for the purpose of this clause, shall commence on the 1st day of July and end on the 30th day of June next following.

##### **RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS**

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
	OVER 2600cc per km	OVER 1600 cc - 2600 cc Cents per km	1600 cc & UNDER cents per km
DISTANCE TRAVELLED EACH YEAR OF EMPLOYER'S BUSINESS			
Metropolitan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5 South Latitude	78.7	67.3	56.4
Rest of the State	73.7	62.9	52.4
Motor Cycle (in all areas)	23.9 cents per kilometre		

- (4) "Metropolitan Area" means that area within a radius of fifty kilometres from the Perth City Railway Station.  
"South West Land Division" means the South West Land Division as defined by Section 28 of the Land Act 1933 excluding the area contained within the Metropolitan Area.
- (5) The allowances prescribed in this clause shall be varied in accordance with any movement in the corresponding allowances in the Public Service Award 1992.

##### 48. - FARES & TRAVELLING ALLOWANCES

- (1) Fares and Travelling Allowances.
- (a) An employee shall be paid for the excess period of travelling time at ordinary rates where:
- The employee is required to work at a location other than the employees usual place of work; and
  - The time taken in travelling from the employees place of residence to work and/or return exceeds the time normally taken in travelling from the employees place of residence to the usual place of work and/or return
- (b) If the fares actually and reasonably incurred in travelling undertaken in accordance with subparagraph (1)(a)(i) exceed the fares normally paid by the employee in travelling from the place of residence and return, the Employer shall pay the employee the difference in the amount of the fares.
- (2) Where an employee is required to take up duty away from headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the employee's usual place of residence, then the employee shall be reimbursed reasonable expenses in accordance with the provisions of Clause 38 – Relieving Allowance of the Public Service Award 1992.
- (3) (a) The provisions of this subclause apply to employees engaged for permanent employment at depots north of the 26th parallel of south latitude.
- (b) In this subclause, "fare" includes the cost of transporting any tools owned by an employee and required by him in his employment.
- (c) Subject to the provisions of this subclause, the fare of an employee from the place of engagement to any place of employment shall be paid by the employer and the employee shall be paid at ordinary rates for not more than eight hours in any day for time spent in travelling to the place of employment, including time occupied in waiting for transport connections, but if the employee uses a mode of travel not approved by the employer travelling time in excess of eight hours shall not be allowed unless the Board of Reference otherwise determines.
- (d) The amount of the fare paid by an employer pursuant to paragraph (c) of this subclause may be deducted from the subsequent earnings of the employee concerned in such manner as is agreed in writing between the employee and the employer.
- (e) If an employee completes six months continuous service with an employer or is dismissed before that time through no fault of his own, any amount deducted by that employer from the employee's wages pursuant to paragraph (d) of this subclause shall be refunded to the employee.
- (f) The employer shall pay the fare of the employee from the place of employment to the place of engagement if the employment terminates and:
- the employee has completed twelve months continuous service with that employer; or
  - the employee has completed six months continuous service with that employer and is dismissed through no fault of his own.

- (g) Where an employee has completed six months continuous service and leaves for a reason deemed reasonable by his employer he shall be paid one-sixth of the fare referred to in paragraph (f) of this subclause for each month of service in excess of six months.

#### 49. - TRAVELLING ALLOWANCE

An officer who travels on official business shall be reimbursed reasonable expenses on the following basis:-

- (1) When a trip necessitates an overnight stay away from headquarters and the officer:-
  - (a) is supplied with accommodation and meals free of charge; or
  - (b) attends a course, conference, etc., where the fee paid includes accommodation and meals; or
  - (c) travels by rail and is provided with a sleeping berth and meals; or
  - (d) is accommodated at a Government institution, hostel or similar establishment and supplied with meals;
 reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule - Travelling, Transfer and Relieving Allowance.
- (2) When a trip necessitates an overnight stay away from headquarters and the officer is fully responsible for his or her own accommodation, meals and incidental expenses:-
  - (a) where hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule - Travelling, Transfer and Relieving Allowance; and
  - (b) where other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule - Travelling, Transfer and Relieving Allowance.
- (3) When a trip necessitates an overnight stay away from headquarters and accommodation only is provided at no charge to the officer, reimbursement shall be made in accordance with the rates prescribed in Column A, Items 1, 2 or 3 and Items 12, 13 or 14 of Schedule - Travelling, Transfer and Relieving Allowance subject to the employees' certification that each meal claimed was actually purchased.
- (4) To calculate reimbursement under subclauses (1) and (2) of this clause for a part of a day, the following formula shall apply:-
  - (a) If departure from headquarters is:
    - before 8.00am - 100% of the daily rate.
    - 8.00am or later but prior to 1.00pm - 90% of the daily rate.
    - 1.00pm or later but prior to 6.00pm - 75% of the daily rate.
    - 6.00pm or later - 50% of the daily rate.
  - (b) If arrival back at headquarters is:
    - 8.00am or later but prior to 1.00pm - 10% of the daily rate.
    - 1.00pm or later but prior to 6.00pm - 25% of the daily rate.
    - 6.00pm or later but prior to 11.00pm - 50% of the daily rate.
    - 11.00pm or later - 100% of the daily rate.
- (5) When an officer travels to a place outside a radius of fifty (50) kilometres measured from the officer's headquarters, and the trip does not involve an overnight stay away from headquarters, reimbursement for all meals claimed shall be at the rates set out in Column A, Items (12) or (13) of Schedule - Travelling, Transfer and Relieving Allowance clause subject to the officer's certification that each meal claimed was actually purchased: Provided that when an officer departs from headquarters before 8.00am and does not arrive back at headquarters until after 11.00pm on the same day the officer shall be paid at the appropriate rate prescribed in Column A, Items (4) to (8) of Schedule - Travelling, Transfer and Relieving Allowance.
- (6) When it can be shown to the satisfaction of the employer by the production of receipts that reimbursement in accordance with Schedule - Travelling, Transfer and Relieving Allowance does not cover an officer's reasonable expenses for a whole trip the officer shall be reimbursed the excess expenditure.
- (7) In addition to the rates contained in Schedule - Travelling, Transfer and Relieving Allowance an officer shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.
- (8) If on account of lack of suitable transport facilities an officer necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the officer shall be reimbursed the actual cost of such accommodation.
- (9) Reimbursement of expenses shall not be suspended should an officer become ill whilst travelling, provided leave for the period of such illness is approved in accordance with provisions of Clause 31. - Sick Leave of this award, and the officer continues to incur accommodation, meal and incidental expenses.
- (10) Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying officer unless the Chief Executive Officer has endorsed the account.
- (11) An officer who is relieving at or temporarily transferred to any place within a radius of fifty (50) kilometres measured from the officer's headquarters shall not be reimbursed the cost of midday meals purchased, but an officer travelling on duty within that area which requires absence from the officer's headquarters over the usual midday meal period shall be paid at the rate prescribed by Item 17 of Schedule - Travelling, Transfer and Relieving Allowance for each meal necessarily purchased, provided that:-
  - (a) such travelling is not a normal feature in the performance of the officer's duties; and
  - (b) such travelling is not within the suburb in which the officer resides; and
  - (c) the officer's total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item (18) of Schedule - Travelling, Transfer and Relieving Allowance.
- (12) Adjustment of Rates:  
The allowances prescribed in this clause shall be varied in accordance with any movement in the corresponding allowances in the Public Service Award 1992.

SCHEDULE - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS
			TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD	
	ALLOWANCE TO MEET INCIDENTAL EXPENSES			
		\$	\$	\$
(1)	WA - South of 26° South Latitude	10.75		
(2)	WA - North of 26° Latitude	13.65		
(3)	Interstate	13.65		
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL			
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL			
(9)	WA - South of 26° South Latitude	73.10		
(10)	WA - North of 26° South Latitude	85.25		
(11)	Interstate	85.25		

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.

(12) WA - South of 26° South Latitude

Breakfast	13.30
Lunch	13.30
Dinner	35.80

(13) WA - North of 26° South Latitude

Breakfast	14.50
Lunch	23.75
Dinner	33.40

(14) Interstate

Breakfast	14.50
Lunch	23.75
Dinner	33.40

DEDUCTION FOR NORMAL LIVING EXPENSES

(15) Each Adult 21.40

(16) Each Child 3.65

MIDDAY MEAL

(17) Rate per meal 5.20

(18) Maximum reimbursement per pay period. 26.00

50. - DISTRICT ALLOWANCES

(1) For the purposes of this clause the following terms shall have the following meaning:

"Dependant" in relation to an employee means:

- (a) a spouse; or
- (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support;

who does not receive a district or location allowance of any kind.

"Partial Dependant" in relation to an employee means:

- (a) a spouse; or
- (b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support;

who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant.

"Spouse" means an employee's spouse including de facto spouse.

(2) For the purpose of this clause, the boundaries of the various districts shall as described hereunder and as delineated on the plan at subclause (15) of this clause.

District:

1. The area within a line commencing on coast; thence east along latitude 28 to a point north of Tallering Peak; thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 and longitude 119; thence south along longitude 119 to coast.
2. That area within a line commencing on the south coast at longitude 119 then east along the coast to longitude 123; then north along longitude 123 to a point on latitude 30; thence west along latitude 30 to the boundary of No. 1 District.
3. The area within a line commencing on coast at latitude 26; thence along latitude 26 to longitude 123; thence south along longitude 123 to the boundary of No. 2 District.
4. The area within a line commencing on the coast at latitude 24; thence east to the South Australian border; thence south to the coast; thence along the coast to longitude 123; thence north to the intersection of latitude 26; thence west along latitude 26 to the coast.
5. That area of the State situated between the latitude 24 and a line running east from Carnot Bay to the Northern Territory border.

That area of the State north of a line running east from Carnot Bay to the Northern Territory border.

- (3) An employee shall be paid a district allowance at the standard rate prescribed in Column II of subclause (6) of this clause, for the district in which the employee's headquarters is located. Provided that where the employee's headquarters is situated in a town or place specified in Column III of subclause (6), the employee shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of subclause (6).
- (4) An employee who has a dependant shall be paid double the district allowance prescribed by subclause (3) of this clause for, the district, town or place in which the employee's headquarters is located.
- (5) Where an employee has a partial dependant the total district allowance payable to the employee shall be the district allowance prescribed by subclause (3) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if he or she was employed in a full time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.
- (6) The annual rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

<b>COLUMN I DISTRICT</b>	<b>COLUMN II STANDARD RATE</b>	<b>COLUMN III EXCEPTIONS TO STANDARD RATE</b>	<b>COLUMN IV RATE</b>
	<b>\$ Per Annum</b>	<b>Town Or Place</b>	<b>\$ Per Annum</b>
6	3,304	Nil	Nil
5	2,704	Fitzroy Crossing Halls Creek Turner River Camp Nullagine Liveringa (Camballin)	3,641    3,383
		Marble Bar Wittenoom Karratha Port Hedland	  3,184 2,962
4	1,362	Warburton Mission Carnarvon	3,660 1,282
3	858	Meekatharra Mount Magnet Wiluna Laverton Leonora Cue	1,362
2	616	Kalgoorlie Boulder Ravensthorpe Norseman Salmon Gums Marvel Loch Esperance	206  813
1	Nil	Nil	Nil



Note: In accordance with subclause (4) of this clause, employees with dependants shall be entitled to double the rate of district allowance shown.

- (7) When an employee is on approved annual recreation leave, the employee shall for the period of such leave, be paid the district allowance to which the employee would ordinarily be entitled.
- (8) When an employee is on long service leave or other approved leave with pay (other than annual recreational leave), the employee shall only be paid district allowance for the period of such leave if the employee, dependants or partial dependants remain in the district in which the employee's headquarters is situated.
- (9) When an employee leaves his or her district on duty, payment of any district allowance to which the employee would ordinarily be entitled shall cease after the expiration of two weeks unless the employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the employer.
- (10) Except as provided in subclause (9) of this clause, a district allowance shall be paid to any employee ordinarily entitled thereto in addition to reimbursement of any travelling transfer or relieving expenses or camping allowance.
- (11) Where an employee whose headquarters is located in a district in respect of which no allowance is prescribed in subclause (6) of this clause, is required to travel or temporarily reside for any period in excess of one month in any district or districts in respect of which such allowance is so payable, the employee shall be paid for the whole of such period a district allowance at the appropriate rate pursuant to subclauses (3), (4) or (5) of this clause, for the district in which the employee spends the greater period of time.
- (12) When an employee is provided with free board and lodging by the employer or a Public Authority the allowance shall be reduced to two-thirds of the allowance the employee would ordinarily be entitled to under this clause.
- (13) An employee who is employed on a part-time basis shall be entitled to district allowance on a pro-rata basis. The allowance shall be determined by calculating the hours worked by the employee as a proportion of the full-time hours prescribed by the Award under which the employee is employed. That proportion of the appropriate district allowance shall be payable to the employee.
- (14) Adjustment of Rates:
  - (a) The allowances prescribed in this clause shall be varied in accordance with any movement in the corresponding allowances in the Public Service Award 1992.
- (15) District Allowance Boundaries Map immediately after the Location Allowance clause.

#### 51. - EMPLOYEES NORTH OF 26TH PARALLEL - TRAVEL CONCESSION, ANNUAL LEAVE

- (1) Employees who work north of the 26th parallel shall be entitled to an annual leave travel concession, on an annual basis, for recreation leave.
- (2) Provided that the entitlement referred to in subclause (1) hereof shall only be available to employees who have worked continuously in the area for 12 months.
- (3) An employee may elect to proceed direct to any point south of the 26th parallel in Western Australia, provided that travel will only be approved to a point not further south than Perth; provided further that where special circumstances exist, approval may be given for the concession to apply to other destinations.
- (4) The concession shall be available in the following manner –
  - (a) a return air fare for the employee and his/her dependants to Perth; or
  - (b) full motor vehicle allowance for the car trip at the rates prescribed in Clause 47. - Car Allowance of this award, provided that reimbursement shall not exceed the cost of a return air fare to Perth for the employee and dependants.
- (5) An employee, who has less than 12 months of service in the abovementioned area and who is required to proceed on annual leave to suit the convenience of the employer, shall be entitled to the provisions of subclause (4) hereof.
- (6) Paid Travelling Time
  - (a) In the case of travel as described in paragraph (a) of subclause (4) hereof, one day, each way, travelling time shall be paid for as though worked.
  - (b) In the case of travel as described in paragraph (b) of subclause (4) hereof, employees shall be entitled to the following travelling time, paid for as though worked –
    - (i) employees stationed north of the 20th degree parallel - 2.5 days each way; or
    - (ii) for the remainder - two days each way.
- (7) The mode of travel shall be at the discretion of the employer.
- (8) A travel concession, not utilised within 12 months of becoming due, will lapse.

#### **PART 8 – APPENDICES**

**APPENDIX A - SALARIES**

## (1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

Classification	Level	Percentage Relativity to C10 Tradesperson	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supplementary Payment	Arbitrated Safety Net Adjustments	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment - Subject to Absorption	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	125	542.20	12.40	72.98	12	0.00	33,365
	Building Tradesperson Level 05	105	383.50	54.60	125	563.06	13.04	73.18	12	0.00	34,497
	Building Tradesperson Level 06	110	401.70	57.20	125	583.92	13.68	73.39	12	0.00	35,629
	Building Tradesperson Level 07	115	420.00	59.80	123	602.78	14.22	73.59	12	0.00	36,652
	Building Tradesperson Level 08	120	438.20	62.40	123	623.64	14.86	61.06	12	0.00	37,120
	Building Tradesperson Level 09	125	456.50	65.00	123	644.50	15.50	61.33	12	0.00	38,256
Painter	Building Tradesperson Level 04	100	365.20	52.00	125	542.20	12.40	56.56	12	0.00	32,508
	Building Tradesperson Level 05	105	383.50	54.60	125	563.06	13.04	56.76	12	0.00	33,640
	Building Tradesperson Level 06	110	401.70	57.20	125	583.92	13.68	56.97	12	0.00	34,773
	Building Tradesperson Level 07	115	420.00	59.80	123	602.78	14.22	57.17	12	0.00	35,795
	Building Tradesperson Level 08	120	438.20	62.40	121	621.64	14.86	44.62	12	0.00	36,158
	Building Tradesperson Level 09	125	456.50	65.00	123	644.50	15.50	44.92	12	0.00	37,399
Plasterer	Building Tradesperson Level 04	100	365.20	52.00	125	542.20	12.40	69.13	12	0.00	33,164
	Building Tradesperson Level 05	105	383.50	54.60	125	563.06	13.04	69.33	12	0.00	34,296
	Building Tradesperson Level 06	110	401.70	57.20	125	583.92	13.68	69.54	12	0.00	35,429
	Building Tradesperson Level 07	115	420.00	59.80	123	602.78	14.22	69.74	12	0.00	36,451
	Building Tradesperson Level 08	120	438.20	62.40	123	623.64	14.86	57.21	12	0.00	36,919
	Building Tradesperson Level 09	125	456.50	65.00	123	644.50	15.50	57.48	12	0.00	38,055
Plumber	Building Tradesperson Level 04	100	365.20	52.00	125	542.20	12.40	88.79	12	0.00	34,189
	Building Tradesperson Level 05	105	383.50	54.60	125	563.06	13.04	88.99	12	0.00	35,322
	Building Tradesperson Level 06	110	401.70	57.20	125	583.92	13.68	89.20	12	0.00	36,454
	Building Tradesperson Level 07	115	420.00	59.80	123	602.78	14.22	89.40	12	0.00	37,476
	Building Tradesperson Level 08	120	438.20	62.40	123	623.64	14.86	76.87	12	0.00	37,944
	Building Tradesperson Level 09	125	456.50	65.00	123	644.50	15.50	77.14	12	0.00	39,080

<u>Classification</u>	<u>Level</u>	<u>Percentage Relativity to C10 Tradesperson</u>	<u>Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.</u>	<u>Supplementary Payment</u>	<u>Arbitrated Safety Net Adjustments</u>	<u>Minimum Rate</u>	<u>Additional Payment</u>	<u>Annualised Weekly Allowances and Loading</u>	<u>Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)</u>	<u>Above Award Payment - Subject to Absorption</u>	<u>Salary</u>
Other Building Employees Not Elsewhere Classified	Building Employee Entrant Level	78	284.86	40.56	123	448.42	9.68	50.29	14	0.00	27,251
	Building Employee Level 1	82	299.46	42.64	123	465.10	10.20	50.42	14	0.00	28,156
	Building Employee Level 2	87	319.18	45.45	123	487.63	10.87	50.62	14	0.00	29,376
	Building Employee Level 3	92	337.44	48.05	123	508.49	11.51	50.80	14	0.00	30,507
	Building Employee Level 4	100	365.20	52.00	125	542.20	12.40	51.19	14	0.00	32,332
Mechanical Fitter, Motor Mechanic, Refrigeration Fitter, Plant Operator and other engineering trades employees not elsewhere classified.	Engineering Employee Level 14	78	284.86	40.56	123	448.42	14.68	49.44	14	0.00	27,468
	Engineering Employee Level 13	82	299.46	42.64	123	465.10	15.40	49.58	14	0.00	28,383
	Engineering Employee Level 12	87.4	319.18	45.45	123	487.63	16.47	49.77	14	0.00	29,624
	Engineering Employee Level 11	92.4	337.44	48.05	123	508.49	17.41	49.96	14	0.00	30,771
	Engineering Tradesperson Level 10	100	365.20	52.00	125	542.20	18.80	61.75	12	0.00	33,113
	Engineering Tradesperson Level 09	105	383.50	54.60	125	563.10	19.70	61.95	12	0.00	34,261
	Engineering Tradesperson Level 08	110	401.70	57.20	125	583.90	20.70	62.16	12	0.00	35,409
	Engineering Tradesperson Level 07	115	420.00	59.80	123	602.80	21.60	62.36	12	0.00	36,452
	Engineering Tradesperson Level 06	125	456.50	65.00	125	646.50	23.50	50.03	12	0.00	38,188
	Engineering Tradesperson Level 05	130	474.80	67.60	123	665.40	24.40	50.18	10	0.00	39,124
Electrical Fitter/Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	125	542.20	18.80	78.15	12	0.00	33,968
	Engineering Tradesperson Level 09	105	383.50	54.60	125	563.10	19.70	78.35	12	0.00	35,116
	Engineering Tradesperson Level 08	110	401.70	57.20	125	583.90	20.70	78.56	12	0.00	36,264
	Engineering Tradesperson Level 07	115	420.00	59.80	123	602.80	21.60	78.76	12	0.00	37,308
	Engineering Tradesperson Level 06	125	456.50	65.00	123	644.50	23.50	66.36	12	0.00	38,935
	Engineering Tradesperson Level 05	130	474.80	67.60	123	665.40	24.40	66.58	10	0.00	39,980

- (2) (a) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.  
These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.  
Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.
- (3) This Award shall not operate to reduce the salary of any employee who is at present receiving above the minimum rate prescribed for their class of work.
- (4) A junior employee, other than an apprentice or trainee, employed to carry out work regulated by this Award, including work normally done by an apprentice or trainee, shall be paid not less than the wage of an adult performing similar work. No new designation shall be introduced during the currency of this Award so as to reduce the status of any employee covered thereby.
- (5) Infirmity
- (a) Any employee who by reason of infirmity is unable to earn the minimum wage may be paid a lesser wage as may from time to time be agreed upon in writing between the Union's and the Employer.
- (b) Where no agreement is reached the matter may be determined in accordance with Clause 11- Dispute Resolution for determination.
- (6) Building Trades Employees  
Except to the extent of any inconsistency with this Award, those parts of Appendix D - Award Restructuring of the Building Trades (Government) Award 1968 No. 31a of 1966 (as at the date of registration of this Award), which pertain to transfer from old classification structures, reclassification of employees and classification definitions, shall apply to this Award.
- (7) Metal Trades Employees  
Except to the extent of any inconsistency with this Award, those parts of Clause 5. - Classification Structure and Definitions of the Engineering Trades (Government) Award 1967 No. 29, 30 & 31 of 1961 & 3 of 1962, (as at the date of registration of this Award), which pertain to transfer from old classification structures, reclassification of employees and classification definitions, shall apply to this Award.
- (8) Plant Operators  
Except to the extent of any inconsistency with this Award, those parts of Clause 5. - Definitions of the Engine Drivers (Government) Award 1983, (provisions applicable as at the date this subclause takes effect), which define a Plant Operator, shall apply to this Award.

#### APPENDIX B. – WORKPLACE REFORM

##### 1. COMPETENCY BASED STANDARDS

- (1) It is a term of this Award that the parties agree to progress the implementation of the metal/electrical trades national competency standards in accordance with the Competency Standards Implementation Guide (Published June 1996), Metal and Engineering Training Package (National Code Identifier MEM98, published July 1998) and the National Metal and Engineering Competency Standards (published 1996), as issued and endorsed by the MERS ITAB, or subsequent amendments thereto where agreed between the parties. To the extent of any inconsistency between these documents and this Award, this Award shall take precedence.
- (2) The Competency Standards shall be implemented on the following basis:
- (a) Assessors
- (i) An assessment may be undertaken by any accredited assessor recognised, from time to time, by the Employer and Union. Such recognition may be withdrawn at any time by either party.
- (ii) The Employer shall endeavour to ensure that sufficient employees (to include trade and managerial staff employed by the Employer) are trained at any time, to meet the assessment requirements of the Area Health Service.
- (iii) In the event of the parties being in dispute regarding the Employer unreasonably withholding or withdrawing recognition of an accredited assessor employed by the Employer, the dispute may be determined through the Dispute Resolution Procedures.
- (b) Assessment Appeals
- (i) In the event of an employee or the Employer disputing the outcome of an assessment, the aggrieved party may refer the matter to a Board of Reference, established in accordance with s 48 of the Industrial relations Act 1979, for determination.
- (ii) The parties agree that the Board of Reference nominees shall consist of an accredited assessor to be nominated by the Employer, and an accredited assessor to be nominated by the employee.
- (c) An employee shall be obliged to participate in competency based assessment, where requested by the Employer.
- (3) It is a term of this Award that the parties agree to investigate the potential for developing competency based assessment for staff not covered by the metal/electrical trades national competency standards. In the event of the parties agreeing to pursue this item following such investigation, the terms of any implementation shall be the subject of a further agreement between the parties.

## 2. MULTISKILLING

- (1) The parties shall establish a Working Party consisting of equal numbers of Employer and employee representatives, to examine the potential for multiskilling of engineering and building services staff. The Working Party shall be established between 4-6 months after the registration of this Award, in order that the skills analysis/skills audit material produced during the implementation of the Competency Standards as defined in subclause (1), shall be available for use by the Working Party. The Working Party shall report back to the parties by no later than 2 months prior to the expiry date of this Award. The Terms of Reference of the working party shall be to:
  - (a) Identify maintenance functions requiring the use of more than one category of Tradesperson and which offer the potential for multiskilling.
  - (b) Identify what additional skills would be required of a tradesperson in particular trades (and what additional skills could legitimately be undertaken without breaching any licensing requirements etc) to be deemed competent to undertake this work.
  - (c) Assess the potential for and the implications of introducing a single classification of Hospital Maintenance Technician and develop a proposal for a classification structure and other changes which would be necessary to accommodate the development of such a classification of employee.
  - (d) Identify and detail career path options and training and development options for an employee in the proposed structure.
- (2) Any such structure is to be built around and have regard to the metal/electrical trades national competency standards.
- (3) The parties shall not be bound in any way by the Working Party's report.

### APPENDIX C – SAVING OF CERTAIN PROVISIONS OF INDUSTRIAL AGREEMENTS REPLACED BY THIS AWARD

- (1) Notwithstanding any other provision of this Award such parts of the industrial agreements specified in Clause (2) of Appendix C which pertain to the achievement of HCU specific workplace reform and productivity improvement matters which are not inconsistent with an express provision of this Award shall continue to apply at the applicable HCU until the parties agree otherwise.
- (2) Industrial agreements.
  - (a) Fremantle Hospital (Engineering Workshops) Enterprise Agreement No. AG5 of 1996.
  - (b) Graylands, Selby Lemnos and Special Care Health Service (Building and Engineering Trades) Enterprise Agreement 1998.
  - (c) Lower North Metropolitan Health Service (Building and Engineering Trades) Enterprise Agreement 1997.
  - (d) Metropolitan Health Service Board – King Edward Memorial and Princess Margaret Hospitals (Physical Resources Department) Enterprise Bargaining Agreement 1997.
  - (e) Royal Perth Engineering Department (Enterprise Bargaining) Agreement 1996.
  - (f) Sir Charles Gairdner Hospital Engineering and Building Services Workshops Enterprise Agreement 1997, AG 85 of 1997.
  - (g) Metropolitan Health Service Board – King Edward Memorial and Princess Margaret Hospitals – (Plant Operators) Enterprise Bargaining Agreement, 1999.
  - (h) Lower Great Southern Health Service (Engineering Department) Enterprise Bargaining Agreement, 1999.

### APPENDIX D – 12 HOUR SHIFT ARRANGEMENTS FOR PLANT OPERATORS

- (1) 12 hour shifts may be worked by Plant Operators.
- (2) Where such arrangements operate, the terms of the arrangement for the working of 12 hour shifts shall be agreed, in writing, between the relevant Union(s) and HCU(s).
- (3) The overtime provisions of this Award will not apply to the ordinary rostered hours of a Plant Operator working 12 hour shifts, except where the hours worked exceed an average of 76 hours per fortnight.
- (4) Time worked in excess of the ordinary working hours shall be paid for at ordinary rates:
  - (a) If it is due to private arrangements between the employees themselves; or
  - (b) If it does not exceed two hours and is due to a relieving person not coming on duty at the proper time; or
  - (c) If it is for the purpose of effecting the customary rotation of shifts.
- (5) The parties to an Agreement made under the terms of this Appendix, may agree to alternative meal and tea break arrangements to those written into this Award, in order to accommodate the 12 hour shift roster. Any such agreed variation shall be incorporated into the written document defining the terms under which the 12 hour shifts will operate.
- (6) On each occasion that the salary rate applicable to Plant Operators varies, the employees affected and the applicable Union(s) shall be notified by the HCU, in writing, of the adjusted salary rate to apply to the Plant Operators.
- (7) Any dispute arising from the operation of this Appendix shall be addressed in accordance with Clause 11 – Dispute Resolution of this Award.”

## PUBLIC SERVICE ARBITRATOR—Awards/Agreements— Variation of—

2004 WAIRC 11069

### HOSPITAL SALARIED OFFICERS' AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)

**APPLICANT**

-v-

HONOURABLE MINISTER FOR HEALTH IN HIS CAPACITY AS THE HOSPITAL BOARD FOR METROPOLITAN HEALTH SERVICES, WA COUNTRY HEALTH SERVICE AND SOUTH WEST HEALTH BOARD

**RESPONDENTS****CORAM**COMMISSIONER P E SCOTT  
PUBLIC SERVICE ARBITRATOR**DATE OF ORDER**

TUESDAY, 6 APRIL 2004

**FILE NO**

P 1 OF 2004

**CITATION NO.**

2004 WAIRC 11069

**Result**

Award varied

### Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr J Ross on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Salaried Officers' Award 1968 (No. 39 of 1968) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 6<sup>th</sup> day of April 2004.

(Sgd.) P E SCOTT,  
Commissioner,  
Public Service Appeal Board.

[L.S.]

### SCHEDULE

**1. Clause 15. - Meal Money: Delete this clause and insert the following in lieu thereof:**

An employee required to work overtime before or after the employees ordinary working hours on any day shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of \$7.90 for breakfast, \$9.75 for the midday meal, and \$11.70 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

**2. Clause 20. - Motor Vehicle Allowances:**

**A. Delete subclause (4) of this clause and insert the following in lieu thereof:**

(4) Allowance for Towing Employer's Caravan or Trailer

In the cases where workers are required to tow employer's caravans on official business, the additional rate shall be 6.5 cents per kilometre. When an employer's trailer is towed on official business the additional rate shall be 3.5 cents per kilometre.

**B. Delete subclause (7) of this clause and insert the following in lieu thereof:**

(7) Requirement to Supply and Maintain a Motor Vehicle

Area Details	Rate (cents) per kilometre		
	Engine Displacement (in cubic centimetres)		
	Over 2600cc to 2600cc	Over 1600cc and under	1600cc
<u>Metropolitan Area</u>			
First 4000 kilometres	149.7	126.6	102.2
Over 4000 up to 8000 kms	61.7	52.7	44.0
Over 8000 up to 16000 kms	32.4	28.1	24.6
Over 16000 kms	34.0	28.8	24.7
<u>South West Land Division</u>			
First 4000 kilometres	154.3	130.9	106.4
Over 4000 up to 8000 kms	64.0	54.8	46.0
Over 8000 up to 16000 kms	33.9	29.4	25.8
Over 16000 kms	35.2	29.7	25.5

Area Details	Rate (cents) per kilometre		
	Engine Displacement (in cubic centimetres)		
	Over 2600cc to 2600cc	Over 1600cc and under	1600cc
<u>North of 23.5° South Latitude</u>			
First 4000 kilometres	170.9	145.4	118.9
Over 4000 up to 8000 kms	70.3	60.2	50.7
Over 8000 up to 16000 kms	36.7	31.9	28.0
Over 16000 kms	36.3	30.6	26.3
<u>Rest of State</u>			
First 4000 kilometres	159.2	134.8	109.2
Over 4000 up to 8000 kms	66.0	56.4	47.2
Over 8000 up to 16000 kms	34.9	30.2	26.5
Over 16000 kms	35.7	30.1	25.9

**C. Delete subclause (8) of this clause and insert the following in lieu thereof:**

(8)	Voluntary Use of a Motor Vehicle			
	Metropolitan Area	69.0	58.9	48.9
	South West Land Division	71.5	61.1	51.0
	North of 23.5° South Latitude	78.7	67.3	56.4
	Rest of the State	73.7	62.9	52.4

**D. Delete subclause (9) of this clause and insert the following in lieu thereof:**

(9)	Voluntary Use of a Motor Cycle			
	Distance Travelled During a Year on Official Business		Rate Cents per kilometre	
	Rate per kilometre		23.9	

**3. Clause 24A Travelling Transfers and Relieving Duty - Rates of Allowance: Delete this clause and insert the following in lieu thereof:**

ITEM	PARTICULARS	<u>COLUMN A</u> DAILY RATE	<u>COLUMN B</u> DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 24(3)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 22(2))	<u>COLUMN C</u> DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 24(3)(ii))
	ALLOWANCE TO MEET INCIDENTAL EXPENSES	\$	\$	\$
(1)	W.A. - South of 26° South Latitude	10.75		
(2)	W.A. - North of 26° South Latitude	13.65		
(3)	Interstate	13.65		
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL			
(4)	W.A. - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude:			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 24(3)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 22(2))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 24(3)(ii))
		\$	\$	\$
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	W.A. - South of 26° South Latitude	73.10		
(10)	W.A. - North of 26° South Latitude	85.25		
(11)	Interstate	85.25		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL NOT INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED				
(12)	W.A. - South of 26° South Latitude:			
	Breakfast	13.30		
	Lunch	13.30		
	Dinner	35.80		
(13)	W.A. - North of 26° South Latitude:			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
(14)	Interstate			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 22(4))				
(15)	Each Adult	21.40		
(16)	Each Child	3.65		

ITEM	PARTICULARS	<u>COLUMN A</u> DAILY RATE	<u>COLUMN B</u> DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 24(3)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 22(2))	<u>COLUMN C</u> DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 24(3)(ii))
		\$	\$	\$
	MIDDAY MEAL (CLAUSE 21(11))			
(17)	Rate per meal	5.20		
(18)	Maximum reimbursement per pay period	26.00		

The allowances prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

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**2004 WAIRC 11016**

**PUBLIC SERVICE AWARD 1992**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION COMMISSIONER FOR ABORIGINAL AFFAIRS AND OTHERS	<b>APPLICANTS</b>
	-v- THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR	
<b>DATE</b>	THURSDAY, 1 APRIL 2004	
<b>FILE NO</b>	P 33 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11016	

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<b>Result</b>	Award amended and consolidated
<b>Representation Applicant</b>	Ms E Ward and with her Mr J Lange
<b>Respondent</b>	Mr M Finnegan and with him Ms K Warlock

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*Reasons for Decision*

*(Given extemporaneously and edited by the Commissioner)*

- 1 This is an application to vary and consolidate the Public Service Award 1992 (No. PSAA 4 of 1989) ("the Award"). The parties have resolved all matters between them except in respect of the issue of the Union's right of entry.
- 2 Firstly, it is appropriate to deal with the issue of right of entry. In respect of clause 59. - Right of Entry and Inspection by Authorised Representations, the parties are in dispute as to the requirement on the Union to give prior advice to the employer of the intention to exercise the right of entry.
- 3 The parties have provided written submissions and I have received those submissions for the purpose of dealing with this matter. I intend to indicate now my conclusions in respect of those submissions.
- 4 The existing clause 47. - Right of Entry contains the following second paragraph and this is together with clause 49H of the Industrial Relations Act 1979 ("the Act") contains the dispute between the parties. The second paragraph of clause 47. - Right of Entry says:
 

"The general secretary of the association or a duly authorised representative shall on notification to the employer have the right to enter the employer's premises during working hours including meal breaks for the purpose of discussing with officers covered by this award the legitimate business of the association or for the purpose of investigating complaints concerning the application of this award but shall in no way unduly interfere with the work of officers."
- 5 The essence of the dispute between the parties is the meaning of the word "notification" and the impact of section 49H of the Act. That section was inserted into the Act by the Labour Relations Reform Act 2002, number 20 of 2002.
- 6 I have considered the definitions of the word "notification" and I note that "notify" means "to report or to give notice of, to inform" (see The Macquarie Dictionary, 3<sup>rd</sup> Edition and the Shorter Oxford English Dictionary on Historical Principles). There is no aspect of that definition which requires any *prior* notice, *prior* reporting or *advance* warning or information.

- 7 Therefore, I conclude that the existing clause allows the union to exercise its right of entry subject to certain conditions simply on attendance at the workplace and on notifying the employer at that time of the exercise of the right of entry.
- 8 As I understand it, the union's general practice as a matter of courtesy has been to give prior warning of the intention to exercise its right of entry. However, I find that the current award provisions does not actually require it to do so.
- 9 Accordingly, the existing second paragraph of clause 47, subject to other necessary changes, does not require amendment according to section 49H of the Act. That matter will be dealt with in minutes of proposed order which shall issue in due course.
- 10 As to the amendment and consolidation of the Award, firstly I note that this, in the context of award coverage of a significant group of employees in this State, is an historic application. I congratulate the parties on the agreement that they have reached and the work which has been done in bringing the Award up to date and in doing so they have met the requirements of the Act. I recognise that considerable time, effort and goodwill has been exhibited by the parties in this exercise. I also note the work of the officers of the Commission's registry in this process and the assistance given in that regard.
- 11 I note with interest that over a decade or more awards had lost some of their significance due to the enterprise bargaining agreement processes. It is pleasing to see that this major award in this State has been brought to the appropriate standard and that the process of doing so has resulted in the resurrection of some skills and processes of award drafting and amendment which might otherwise have been lost in the mists of time. I congratulate the parties in their work in this regard.
- 12 I am satisfied that the Award as amended will meet the requirements of the Act and that there is no impediment to the order for the amendment and consolidation of the Award proceeding. Minutes of proposed order will issue upon receipt from the parties of the dispute settlement procedure which they will deal with. The operative date for these amendments will be the beginning of the first pay period commencing on or after the date upon which the order is issued.

2004 WAIRC 11055

**PUBLIC SERVICE AWARD 1992**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 COMMISSIONER FOR ABORIGINAL AFFAIRS AND OTHERS

**PARTIES****APPLICANTS**

-v-

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**RESPONDENT****CORAM**

COMMISSIONER P E SCOTT  
 PUBLIC SERVICE ARBITRATOR

**DATE OF ORDER**

MONDAY, 5 APRIL 2004

**FILE NO**

P 33 OF 2003

**CITATION NO.**

2004 WAIRC 11055

**Result**

Award amended and consolidated

*Order*

HAVING heard Ms E Ward and Mr J Lange on behalf of the applicants and Mr M Finnegan and Ms K Worlock on behalf of the respondent, and by consent except in respect of the Association's right of entry, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Public Service Award 1992 be amended and consolidated in accordance with the following Schedule and that such amendment and consolidation shall have effect from the beginning of the first pay period commencing on or after the 5<sup>th</sup> day of April 2004.

(Sgd.) P E SCOTT,  
 Commissioner,  
 Public Service Arbitrator.

[L.S.]

**SCHEDULE****1. - TITLE**

This Award shall be known as the Public Service Award 1992 and shall supersede and replace the Public Service Salaries Agreement 1985 (PSA AG5 of 1985) and the Public Service General Conditions of Service and Allowances Award (PSA A4 of 1989).

**1B. - MINIMUM ADULT AWARD WAGE**

- (1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.
- (2) The Minimum Adult Award Wage for full time adult employees is \$448.40 per week payable on and from 5 June 2003.
- (3) The Minimum Adult Award Wage of \$448.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.
- (4) Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

- (5) Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of \$448.40 per week.
- (6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.
- (b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.
- (7) Subject to this clause the Minimum Adult Award Wage shall –
- (a) apply to all work in ordinary hours.
- (b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.
- (8) Minimum Adult Award Wage
- The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2003 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.
- (9) Adult Apprentices
- (a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than the following amounts –
- (i) \$285.00 per week from the beginning of the first pay period commencing on or after 1<sup>st</sup> November 2003;
- (ii) \$315.00 per week from the beginning of the first pay period commencing on or after 31<sup>st</sup> January 2004; and
- (iii) \$406.70 per week from the beginning of the first pay period commencing on or after 30<sup>th</sup> April 2004.
- (b) The rate paid at paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.
- (c) Where in an Award an additional rate is expressed as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of the apprenticeship.
- (d) Nothing in this sub-clause shall operate to reduce the rate of pay fixed by the Award for an adult apprentice in force immediately prior to 5 June 2003.

## 2. - ARRANGEMENT

1. Title
- 1B. Minimum Adult Award Wage
2. Arrangement
3. Area of Operation
4. Scope
5. Term of Award
6. Definitions
7. Certificate of Service
8. Contract of Service
9. Part-Time Employment
10. Casual Employment
11. Salaries
12. Salaries Specified Callings
13. Purchased Leave - 48/52 Salary Arrangement
14. Purchased Leave - Deferred Salary Arrangement
15. Salary Packaging Arrangement
16. Supported Wage
17. Traineeships
18. Annual Increments
19. Higher Duties Allowance
20. Hours
21. Shift Work Allowance
22. Overtime Allowance
23. Annual Leave
24. Public Holidays
25. Long Service Leave
26. Sick Leave
27. Carers Leave
28. Parental Leave
29. Leave Without Pay
30. Study Leave

31. Short Leave
32. Bereavement Leave
33. Cultural/Ceremonial Leave
34. Blood/Plasma Donors Leave
35. Emergency Service Leave
36. Union Facilities for Union Representatives
37. Leave to Attend Association Business
38. Trade Union Training Leave
39. Training With Defence Force Reserves Leave
40. International Sporting Events Leave
41. Witness and Jury Service
42. Camping Allowance
43. District Allowance
44. Disturbance Allowance
45. Diving Allowance
46. Flying Allowance
47. Motor Vehicle Allowance
48. Property Allowance
49. Protective Clothing Allowance
50. Relieving Allowance
51. Removal Allowance
52. Sea Going Allowance
53. Transfer Allowance
54. Travelling Allowance
55. Weekend Absence From Residence
56. Preservation of Rights
57. Keeping of and Access to Employment Records
58. Notification of Change
59. Right of Entry and Inspection by Authorised Representatives
60. Copies of Award
61. Establishment of Consultative Mechanisms
62. Special Conditions
63. Transition]
64. Dispute Settlement Procedure
  - Schedule A Salaries
  - Schedule B Salaries - Specified Callings
  - Schedule C Camping Allowance
  - Schedule D District Allowance
  - Schedule E Motor Vehicle Allowance
  - Schedule F Motor Vehicle Allowance
  - Schedule G Motor Cycle Allowance
  - Schedule H Overtime
  - Schedule I Travelling, Transfer and Relieving Allowance
  - Schedule J Shift Work Allowance
  - Schedule K Diving, Flying and Sea Going Allowance
  - Schedule L Named Parties

### 3. - AREA OF OPERATION

This Award shall apply throughout the State of Western Australia.

### 4. - SCOPE

This Award shall apply to all public service officers, other than those listed in (a), (b) and (c) of this clause, appointed under *Part 3 or Part 8 Section 100, of the Public Sector Management Act 1994* or continuing as such by virtue of *clause 4(c) of Schedule 5* of that Act, who are members of or eligible to be members of the Civil Service Association of Western Australia (Inc).

- (a) A public service officer whose remuneration payable is determined or recommended pursuant to the Salaries and Allowances Act 1975.
- (b) A public service officer whose remuneration is determined by an Act to be at a fixed rate, or is determined or to be determined by the Governor pursuant to the provisions of any Act.
- (c) An employing authority as defined in section 3(1) of the Public Sector Management Act 1994.

### 5. - TERM OF AWARD

This Award shall operate as from the first pay period commencing on or after the 1<sup>st</sup> day of December 1992 and shall remain in force for a period of three years.

### 6. - DEFINITIONS

In this Award, the following expressions shall have the following meaning:-

“Administrative Instruction” means administrative instruction as defined by Schedule 5 of the *Public Sector Management Act 1994*.

“Casual Officer” means an officer engaged by the hour for a period not exceeding one calendar month in any period of engagement, as determined by the employer.

“Chief Executive Officer” in relation to any officer employed in a Department, means the person immediately responsible for the general management of the Department to the Minister of the Crown for the time being administering the Department.

“Employer” and “Employing Authority” means employing authorities as defined by section 5 of the *Public Sector Management Act 1994*.

“Headquarters” means the place in which the principal work of an officer is carried out, as defined by the employer.

“Metropolitan Area” means that area within a radius of fifty (50) kilometres from the Perth City Railway Station.

“Officers” means public service officers and executive officers employed in the Public Service under *Part 3 and Part 8 of the Public Sector Management Act 1994*.

“Partner” means either spouse or defacto partner.

“De Facto Partner” means a relationship (other than a legal marriage) between two persons who live together in a ‘marriage-like’ relationship and includes same sex partners.

“Spouse” means a person who is lawfully married to that person.

“The Association” means the Civil Service Association of Western Australia Incorporated.

#### 7. - CERTIFICATE OF SERVICE

On request, the employer shall issue a Certificate of Service containing full information as to the period of service, and nature of duties performed by the officer to the officer on redundancy, retirement, resignation or where contracts of service expire through the effluxion of time.

#### 8. - CONTRACT OF SERVICE

##### (1) Probation

- (a) Every officer appointed to the Public Service shall normally be on probation for a period not exceeding six months, unless otherwise determined by the employer.
- (b) An officer who is appointed from the Public Sector of Western Australia, and who has had at least six months of continuous satisfactory service immediately prior to permanent appointment will not be required to serve a period of probation.
- (c) At any time during the period of probation the employer may annul the appointment and terminate the services of the officer by the giving of one week’s notice or payment in lieu thereof.
- (d) Prior to the expiry of the period of probation, the employer shall have a report completed in respect to the officer’s level of performance, efficiency, and conduct, and
  - (i) confirm the permanent appointment, or
  - (ii) extend the period of probation by up to six months, to a maximum period of probation of 12 months
  - (iii) or terminate the services of the officer.

##### (2) Discipline

The disciplinary provisions of the Public Sector Management Act 1994 shall apply to every officer employed under that Act.

##### (3) Termination of Employment

- (a) An officer shall give the employer written notice of intention to resign of not less than –
  - (i) one month, or
  - (ii) such other period as specified in the officer’s contract of service where applicable.
- (b) An officer who fails to give the required written notice forfeits the sum of \$500, unless agreement is reached between an officer and the employer for a shorter period of notice than that specified.
- (c) Where an officer’s services are terminated for any reason other than dismissal, that officer shall be given written notice of –
  - (i) one month, or
  - (ii) such other period as specified in a contract of service, where applicable.
 or payment of salary for the appropriate period in lieu of notice.
- (d) The employment of a casual officer may be terminated at any time by the casual officer or the employer giving to the other, one hour’s prior notice. In the event of a employer or casual officer failing to give the required notice, one hour’s salary shall be paid or forfeited.

##### (4) Retirement

An officer having attained the age of 55 years shall be entitled to retire from the employ of the employer.

##### (5) Contract Employment

Notwithstanding the other provisions contained in this clause, the Employer may employ officers on a fixed term contract to the extent of the provisions of the Administrative Instructions.

Officers appointed for a fixed term shall be advised in writing of the terms of the appointment and such advice shall specify the dates of commencement and termination of employment.

The provisions of subclause (2) and (3) of this clause shall also apply to officers employed on a fixed term contract.

#### 9. - PART-TIME EMPLOYMENT

##### (1) Definitions

- (a) Part-time employment is defined as regular and continuing employment of less than 37.5 hours per week by permanent or fixed term contract staff.

- (2) Part-Time Agreement
- (a) Each part-time arrangement shall be confirmed in writing and shall include the agreed period of the arrangement, and the agreed hours of duty in accordance with subclause (3) of this clause.
- (b) The conversion of a full-time officer to part-time employment can only be implemented with the written consent or by written request of that officer. No officer may be converted to part-time employment without the officer's prior agreement.
- (3) The Hours of Duty will be in accordance with Clause 20 Hours of this award, including flexible working hours.
- (a) The employer shall specify in writing before a part-time officer commences duty, the prescribed weekly and daily hours of duty for the officer including starting and finishing times each day ("ordinary hours").
- (b) The employer shall give an officer one (1) month's notice of any proposed variation to that officer's starting and finishing times and/or particular days worked, provided that the employer shall not vary the officer's total weekly hours of duty without the officer's prior written consent, a copy of which shall be sent to the designated officer at the Association.
- (c) All variations to an officer's working hours must be agreed to in writing by the part-time officer.
- If agreement is reached to vary an officer's ordinary working hours pursuant to this subclause:
- (i) Time worked to 7½ hours on any day is not to be regarded as overtime but an extension of the contract hours for that day and should be paid at the normal rate of pay.
- (ii) Overtime shall not be payable unless the total time worked on any day exceeds 8 hours.
- (iii) Additional days worked, up to a total of five days per week, are also regarded as an extension of the contract and should be paid at the normal rate. Days worked on a Saturday or Sunday are to be paid in accordance with Clause 21 Shiftwork (2) (b).
- (4) Salary and Annual Increments
- (a) An officer who is employed on a part-time basis shall be paid a proportion of the appropriate full-time salary dependent upon time worked. The salary shall be calculated in the following manner: -
- $$\frac{\text{Hours worked per fortnight}}{75} \times \frac{\text{Full-time fortnightly salary}}{1}$$
- (b) A part-time officer shall be entitled to annual increments in accordance with Clause 18. - Annual Increments of this Award, subject to meeting the usual performance criteria.
- (c) A part-time officer shall be entitled to the same leave and conditions prescribed in this Award for full time officers.
- (d) Payment to an officer proceeding on accrued annual leave and long service leave shall be calculated on a pro rata basis having regard for any variations to the officer's ordinary working hours during the accrual period.
- (e) Sick leave and any other paid leave shall be paid at the current salary, but only for those hours or days that would normally have been worked had the officer not been on such leave.
- (5) Public Holidays
- A part-time officer shall be allowed the prescribed Public Holidays without deduction of pay in respect of each holiday, which is observed on a day ordinarily worked by the part-time officer.
- (6) Right of Reversion of Officers
- (a) Where a full-time officer is permitted to work part-time for a period no greater than 12 months the officer has a right (upon written application) to revert to full-time hours in the position previously occupied before becoming part time or a position of equal classification as soon as deemed practicable by the employer, but no later than the expiry of the agreed period.
- (b) Where a full-time officer is permitted to work part-time for a period greater than 12 months that officer may apply to revert to full-time hours in the position previously occupied before becoming part time or a position of equal classification, but only as soon as is deemed practicable by the employer. This should not prevent the transfer of the officer to another full-time position at a salary commensurate to his or her previous full-time position.
- (7) The number or proportion of part-time officers employed in departments shall not exceed any number or proportion that may be agreed in writing between the Association and the employer.

#### 10. - CASUAL EMPLOYMENT

- (1) Salary
- (a) A casual officer shall be paid for each hour worked at the appropriate classification contained in Clause 11. - Salaries or Clause 12. - Salaries Specified Callings of this Award in accordance with the following formula:
- $$\frac{\text{Fortnightly Salary}}{75}$$
- With the addition of twenty percent in lieu of annual leave, sick leave, long service leave and payment for public holidays.
- (b) The provisions of subclause (3) (a) and (d) of Clause 11. - Salaries of this Award shall not apply to a casual officer.
- (2) Conditions of Employment
- (a) Conditions of employment, leave and allowances provided under the provisions of this Award shall not apply to a casual officer with the exception of bereavement leave. However, where expenses are directly and necessarily incurred by a casual officer in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.

- (b) Nothing in this clause shall confer "permanent" or "fixed term contract" officer status within the meaning of Section 64 of the Public Sector Management Act 1994.
- (c) The employment of a casual officer may be terminated at any time by the casual officer or the employer giving to the other, one hour's prior notice. In the event of an employer or casual officer failing to give the required notice, one hour's salary shall be paid or forfeited.
- (d) The provisions of the Overtime Allowance in this Award do not apply to Casual Officers who are paid by the hour for each hour worked. Additional hours are paid at the normal casual rate.
- (e) A casual officer shall be informed that their employment is casual and that they have no entitlement to paid leave, with the exception of bereavement leave before they are engaged.

#### 11. - SALARIES

- (1) Subject to Clause 17 Traineeships the annual salaries applicable to officers not covered by Clause 12. - Salaries Specified Callings of this Award shall be those contained in Schedule A.
- (2) An adult officer employed pursuant to Level 1 shall commence employment at Level 1.1. Provided that at the discretion of the employer, the officer may be appointed to a higher incremental level subject to previous relevant knowledge and experience.
- (3) Payment Of Salaries
  - (a) Salaries shall be paid fortnightly but, where the usual payday falls on a public holiday, payment shall be made on the previous working day.
  - (b) Dividing the annual salary by 313 and multiplying the result by 12 shall compute a fortnight's salary.
  - (c) The hourly rate shall be computed as one seventy-fifth of the fortnight's salary.
  - (d) Salaries shall be paid by direct funds transfer to the credit of an account nominated by the officer at a bank, building society or credit union approved by the Under Treasurer or an Accountable Officer.
  - (e) Provided that where such form of payment is impracticable or where some exceptional circumstances exist, and by agreement between the employer and the Association, payment by cheque may be made.
- (4) Arbitrated Safety Net Adjustments
  - (a) The rates of pay in this Award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.
  - (b) These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by officers since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.
  - (c) Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.
- (5) Special Allowances
 

The employer shall not be prohibited from granting special allowances based on additional duties and responsibilities undertaken by an officer due to expertise and knowledge of the officer.
- (6) Amalgamation of Salary Classes
 

In allocating salaries or salary ranges in accordance with Section 29 of the Public Sector Management Act 1994 the employer may amalgamate any two or more levels or, allocate specific salary points from a level or levels prescribed by this Award.

#### 12. - SALARIES SPECIFIED CALLINGS

- (1) Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Community Corrections Officer, Dental Officer, Dietician, Education Officer, Engineer, Forestry Officer, Geologist, Laboratory Technologist, Land Surveyor, Legal Officer, Librarian, Medical Officer, Medical Scientist, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, shall be entitled to annual salaries as contained in Schedule B.
- (2) Subject to subclause (5) of this Clause, on appointment or promotion to the Level 2/4 under this clause.
  - (a) Officers, who have completed an approved three-year tertiary qualification, relevant to their calling, shall commence at the first year increment.
  - (b) Officers who have completed an approved four-year tertiary qualification, relevant to their calling, shall commence at the second year increment.
  - (c) Officers, who have completed an approved Masters or PhD degree relevant to their calling shall commence on the third year increment.

Provided that officers who attain a higher tertiary level qualification after appointment shall not be entitled to any advanced progression through the range.
- (3) The Executive Director, Labour Relations, Department of Consumer and Employment Protection shall be exclusively responsible for determining the relevant acceptable qualifications for appointment for the callings covered by this clause and shall maintain a manual setting out such qualifications.
- (4) The Executive Director, Labour Relations, Department of Consumer and Employment Protection in allocating levels pursuant to subclause (1) of this clause may determine a commencing salary above level 2/4 for a particular calling/s.
- (5) The following conditions shall apply to officers in the callings detailed below:

- (a) Education Officers - Officers employed in the calling of Education Officer and appointed or promoted to level 2/4 under this Agreement shall commence on the following salary points:
- (i) Officers who have completed an approved three-year qualification, relevant to their calling, shall commence at the first year of the range, subject to subparagraph (v) of this subclause.
  - (ii) Officers who have completed an approved four-year tertiary qualification, relevant to their calling, shall commence at the second year of the range, subject to subparagraph (v) of this subclause.
  - (iii) Officers, who hold a relevant qualification such as an Honours or other four year degree (or equivalent) plus a Diploma of Education, or a relevant Masters degree or PhD, shall commence at the third year of the range subject to subparagraph (v) of this subclause.
  - (iv) Officers, who hold a relevant Masters Degree or PhD plus a Diploma of Education, shall commence at the fourth year of the range, subject to subparagraph (v) of this subclause.
  - (v) Officers, who have not less than two years of relevant experience, shall receive an additional increment at the time of appointment. Where the officer has had three or more years of relevant experience, two additional increments shall be granted at the time of commencement.
- (b) Engineers -
- (i) Officers employed in the calling of Engineer and who are classified level 2/4 under this Award shall be paid a minimum salary at the rate prescribed for the maximum of level 2/4 where the officer is an "experienced engineer" as defined.  
For the purposes of this paragraph "experienced engineer" shall mean: -
    - (aa) An engineer appointed to perform professional engineering duties and who is a Corporate Member of the Institution of Engineers, Australia or who attains that status during service.
    - (bb) An engineer appointed to perform professional duties who is not a Corporate Member of The Institution of Engineers, Australia but who possesses a degree or diploma from a University, College or Institution acceptable to the Executive Director, Labour Relations, Department of Consumer and Employment Protection on the recommendation of the Institution of Engineers, Australia, and who -
      - (A) having graduated in a four or five year degree course at a University or Institution recognised by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, has had four years experience on professional engineering duties acceptable to the employer since becoming a qualified engineer, or
      - (B) not having a University degree but possessing a diploma recognised by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, has had five years experience on professional engineering duties, recognised by the employer since becoming a qualified engineer.
- (c) Legal Officers - there shall be for the calling of Legal Officer an additional salary point which shall be the salary applicable to Level 9 (maximum) plus a special allowance equivalent to half the difference between Level 9 (maximum) and Class 1.
- (d) Medical Officers and Psychiatrists - there shall be for the callings of Medical Officers and Psychiatrists two additional salary points which may be used. These salary points shall be:
- (i) The salary applicable to Class 1 plus a Special Allowance equivalent to half the difference between Class 1 and Class 2.
  - (ii) The salary applicable to Class 2 plus a Special Allowance equivalent to half the difference between Class 2 and Class 3.
- (e) Architectural Graduate - Officers employed in the calling of Architectural Graduate, as defined, and appointed or promoted to Level 2/4 shall commence on the following salary points:
- (i) Officers who have completed an approved five-year tertiary qualification, relevant to this calling, shall commence at the second year increment.
  - (ii) Officers who have completed and approved Masters or PHD degree, relevant to this calling, shall commence at the third year increment.
- For the purposes of this paragraph "Architectural Graduate" shall mean an officer who possesses a relevant tertiary level qualification or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection but is not registered with the Architects Board of Western Australia as an Architect, and who undertakes such duties as are necessary for achieving such registration with the Architects Board of Western Australia.
- (f) Architect - Officers employed in the calling of Architect, as defined, and appointed or promoted to Level 2/4 shall commence at the fourth year increment.
- For the purposes of this paragraph "Architect" shall mean an officer who possesses a relevant tertiary level qualification or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and possesses the necessary experience and is registered with the Architects Board of Western Australia as an Architect.

### 13. - PURCHASED LEAVE- 48/52 SALARY ARRANGEMENT

- (1) The employer and an officer may agree to enter into an arrangement whereby the officer can purchase up to four weeks additional leave.
- (2) The employer will assess each application for 48/52-salary arrangement on its merits and give consideration to the personal circumstances of the officer seeking the arrangement.
- (3) Access to this entitlement will be subject to the officer having satisfied the Agency's accrued leave management policy.

- (4) The officer can agree to take a reduced salary spread over the 52 weeks of the year and receive the following amounts of additional purchased leave:

Number of weeks' salary spread over 52 weeks	Number of weeks' additional purchased leave.
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

- (5) The additional purchased leave will not be able to be accrued. The officer is to be entitled to pay in lieu of the additional leave not taken. In the event that the officer is unable to take such purchased leave, his/her salary will be adjusted on the last pay period in January to take account the fact that time worked during the year was not included in the salary.
- (6) Where an officer who is in receipt of an allowance provided for in Clause 19 - Higher Duties Allowance, of this Award proceeds on any period of additional purchased leave the officer shall not be entitled to receive payment of the allowance for any period of additional purchased leave. When not on a period of purchased leave the officer shall receive the full entitlement to Higher Duties Allowance in accordance with Clause 19.
- (7) In the event that a part time officer's ordinary working hours are varied during the year, the salary paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the officer's ordinary working hours during the previous year.

#### 14. - PURCHASED LEAVE - DEFERRED SALARY ARRANGEMENT

- (1) With the written agreement of the employer, an officer may elect to receive, over a four-year period, 80% of the salary they would otherwise be entitled to receive in accordance with the Award.
- (2) The employer will assess each application for deferred salary on its merits and give consideration to the personal circumstances of the officer seeking the leave.
- (3) On completion of the fourth year, an officer will be entitled to 12 months leave and will receive an amount equal to 80% of the salary they were otherwise entitled to in the fourth year of deferment.
- (4) Where an officer completes four (4) years of deferred salary service and is not required to attend duty in the following year, the period of non-attendance shall not constitute a break in service and shall count as service on a pro-rata basis for all purposes.
- (5) An officer may withdraw from this arrangement prior to completing a four-year period by written notice. The officer will receive a lump sum payment of salary forgone to that time but will not be entitled to equivalent absence from duty.
- (6) The employer will ensure that superannuation arrangements and taxation effects are fully explained to the officer by the relevant Authority. The employer will put any necessary arrangements into place.

#### 15. - SALARY PACKAGING ARRANGEMENT

- (1) An officer may, by agreement with the employer, enter into a salary packaging arrangement in accordance with this clause and Australian Taxation Office requirements.
- (2) Salary packaging is an arrangement whereby the entitlements and benefits under this Award, contributing toward the Total Employment Cost (TEC) (as defined in subclause (3) of this clause) of an officer, can be reduced by and substituted with another or other benefits.
- (3) The TEC for salary packaging purposes is calculated by adding the following entitlements and benefits:
- the base salary;
  - other cash allowances;
  - non cash benefits;
  - any Fringe Benefit Tax liabilities currently paid; and
  - any variable components.
- (4) Where an officer enters into a salary packaging arrangement the officer will be required to enter into a separate written agreement with the employer setting out the terms and conditions of the salary packaging arrangement.
- (5) Notwithstanding any salary packaging arrangement, the salary rate as specified in this Award, is the basis for calculating salary related entitlements specified in the Award.
- (6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory employer contributions made to superannuation schemes established under the State Superannuation Act 2001 and the Parliamentary Superannuation Act 1970 are calculated on the gross (pre packaged) salary amount regardless of whether an officer participates in a salary packaging arrangement with their employer.
- (7) A salary packaging arrangement cannot increase the costs to the employer of employing an individual.
- (8) A salary packaging arrangement is to provide that the amount of any taxes, penalties or other costs for which the employer or officer is or may become liable for and are related to the salary packaging arrangement, shall be borne in full by the officer.
- (9) In the event of any increase in taxes, penalties or costs relating to a salary packaging arrangement, the officer may vary or cancel that salary packaging arrangement.

#### 16. - SUPPORTED WAGE

- (1) Workers Eligible for a Supported Wage

This clause defines the conditions that will apply to officers who, because of the effects of a disability, are eligible for a supported wage under the terms of this clause. In the context of this clause, the following definitions will apply:

"Supported Wage System" means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in "(Supported Wage System: Guidelines and Assessment Process)";

"Accredited Assessor ", means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessment of an individual's productive capacity within the Supported Wage System;

"Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme; and

"Assessment Instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(2) Eligibility Criteria

Officers covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the officer is engaged under the Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (This clause does not apply to any existing officer who has a claim against the employer, which is subject to the provisions of workers' compensation legislation, or any provision of the Award relating to the rehabilitation of officers who are injured in the course of their current employment).

This clause also does not apply to employers in respect of their facility, programme, undertaking, service or the like which receives funding under the Disability Services Act 1986 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or eligible for a Disability Support Pension, except with respect to an organisation which has received recognition under s10 or s12A of the Act, or if a part only has received recognition, that part.

(3) Supported Wage Rates

Officers to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by the Award for the class of work, which the person is performing according to the following schedule:

Assessed Capacity (clause 16.5)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than \$60 per week).

\*Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

(4) Assessment of Capacity

For the purpose of establishing the percentage of the Award rate to be paid to the officers, the productive capacity of the officer will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (a) the employer and the union, in consultation with the officer, or if desired by any of these; or
- (b) the employer and an accredited Assessor from a panel agreed by the parties to the Award and the officer.

(5) Lodgement of Assessment Instruments

All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage rate to be paid to the officer, shall be lodged by the employer with the Registrar of the Commission.

All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where the union is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

(6) Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

(7) Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Officers covered by the provisions of this clause will be entitled to the same terms and conditions of employment as all other officers covered by the Award paid on a pro rata basis.

(8) Workplace Adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the officer's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other officers in the area.

(9) Trial Period

In order for an adequate assessment of the officer's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.

During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

The minimum amount payable to the officer during the trial period shall be no less than \$53 per week.

Work trials should include induction or training as appropriate to the job being trialed.

Where the employer and officer wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause 16.5.

#### 17. - TRAINEESHIPS

(1) Definitions

“Part time trainee” means a trainee who is employed for a minimum of 20 hours per week (except in the case of school based traineeships), and has regular and stable hours of work each week, to allow training to occur. Wages and entitlements accrue on a pro-rata basis.

“Traineeship” means a full time or part time structured employment based training arrangement approved by the Western Australian Department of Education and Training where the trainee gains work experience and has the opportunity to learn new skills in a work environment. On successful completion of the traineeship the trainee obtains a nationally recognised qualification.

“Traineeship Training Contract” means the agreement between the employer and the trainee that provides details of the traineeship and obligations of the employer and the trainee and is registered with the Western Australian Department of Education and Training.

“Training Plan” means the plan that outlines what training and assessment will be conducted off-the-job and what will be conducted on-the-job and how the Registered Training Organisation will assist in ensuring the integrity of both aspects of the training and assessment process.

(2) TRAINEESHIPS

(a) Trainees are to be additional to the normal workforce of the employers so that trainees shall not replace paid workers or volunteers or reduce the hours worked by existing officers.

(b) Training Conditions:

The arrangements between the employer and the trainee in relation to the traineeship are as specified in the Traineeship Training Contract, as administered by the Department of Education and Training. The trainee will be trained in accordance with the agreed Training Plan.

(c) Employment Conditions:

- (i) the initial period of employment for trainees is the nominal training period endorsed at the time the particular traineeship is established;
- (ii) completion of the traineeship scheme will not guarantee the trainee future employment in the public sector, but the employer will cooperate to assist the trainee to be placed in suitable employment, should a position arise;
- (iii) trainees are permitted to be absent from work without loss of continuity of employment to attend off the job training in accordance with the Training Plan. However, except for absences provided for under this Award, failure to attend for work or training without an acceptable cause may result in loss of pay for the period of the absence;
- (iv) trainees will receive a mix of supervised work experience, structured training on the job and off the job, and the opportunity to practice new skills in a work environment; and
- (v) overtime and shift work shall not be worked by trainees except to enable the requirements of the training to be effected. When overtime and shift work are worked the relevant allowances and penalties of the Award, based on the training wage stated in sub clause 1.4 will apply. No trainee shall work overtime or shift work unsupervised.

(d) Wages:

The salary applicable to trainees shall be as prescribed in the National Training Wage Award 2000 for officers up to and including 20 years of age. Adult trainees will be paid the rate prescribed under the *Minimum Conditions of Employment Act 1993* for the minimum weekly rate of pay for officers 21 or more years of age.

#### 18. - ANNUAL INCREMENTS

(1) Officers shall proceed to the maximum of their salary range by annual increments subject to a satisfactory report on the officer's level of performance and conduct.

(2) The following procedure will apply prior to the payment of an increment:

- (a) Their manager will produce a report on the officer's performance and conduct no later than 12 months since the officer's last incremental advance.
- (b) Where the report is satisfactory, the increment will be paid.
- (c) Where the report is unsatisfactory:
  - The officer will be shown the report and required to initial it.
  - The officer will be provided with an opportunity to comment in writing.
  - The officer's comments will be considered immediately by the employer and a decision made as to whether to approve the payment of the increment or withhold payment for a specific period.
  - Where the increment is withheld, the employer before the expiry of the specified period will complete a further report and the above provisions will apply.

(3) The non-payment of an increment will not change the normal anniversary date of any further increment payments.

#### 19. - HIGHER DUTIES ALLOWANCE

(1) An officer who is directed by the employer to act in an office which is classified higher than the officer's own substantive office and who performs the full duties and accepts the full responsibility of the higher office for a continuous period of

five (5) consecutive working days or more, shall, subject to the provisions of this clause, be paid an allowance equal to the difference between the officer's own salary and the salary the officer would receive if the officer was permanently appointed to the office in which the officer is so directed to act.

Provided that where the hours of duty of an officer performing shift work are greater than 7½ hours per day as provided for in paragraph (3)(a) of Clause 21. - Shift Work Allowance of this Award the allowance shall be payable after the completion of 37½ consecutive working hours in the higher classified position. This period shall not include any time worked as overtime.

- (2) Where the full duties of a higher office are temporarily performed by two (2) or more officers they shall each be paid an allowance as determined by the employer.
- (3) An officer who is directed to act in a higher classified office but who is not required to carry out the full duties of the position and/or accept the full responsibilities, shall be paid such proportion of the allowance provided for in subclause (1) of this clause as the duties and responsibilities performed bear to the full duties and responsibilities of the higher office. Provided that the officer shall be informed, prior to the commencement of acting in the higher classified office, of the duties to be carried out, the responsibilities to be accepted and the allowance to be paid.  
The allowance paid may be adjusted during the period of higher duties.
- (4) Where an officer who has qualified for payment of higher duties allowance under this clause is required to act in another office or other offices classified higher than the officer's own for periods less than five consecutive working days without any break in acting service, such officer shall be paid a higher duties allowance for such periods: provided that payment shall be made at the highest rate the officer has been paid during the term of continuous acting or at the rate applicable to the office in which the officer is currently acting - whichever is the lesser.
- (5) Where an officer is directed to act in an office which has an incremental range of salaries such an officer shall be entitled to receive an increase in the higher duties allowance equivalent to the annual increment the officer would have received had the officer been permanently appointed to such office; provided that acting service with allowances for acting in offices for the same classification or higher than the office during the eighteen (18) months preceding the commencement of such acting shall aggregate as qualifying service towards such an increase in the allowance.
- (6) Where an officer who is in receipt of an allowance granted under this clause and has been so for a continuous period of twelve (12) months or more, proceeds on -
  - (a) a period of normal annual leave; or
  - (b) a period of any other approved leave of absence of not more than four (4) weeks,
 the officer shall continue to receive the allowance for the period of leave: provided that this subclause shall also apply to an officer who has been in receipt of an allowance for less than twelve (12) months if during the officer's absence no other officer acts in the office in which the officer was acting immediately prior to proceeding on leave and the officer resumes in the office immediately on return from leave.
- (7) For the purpose of this subclause the expression "normal annual leave" shall mean the annual period of recreation leave as referred to in Clause 23. - Annual Leave of this Award and shall include any public holidays and leave in lieu accrued during the preceding twelve (12) months taken in conjunction with such annual leave.
- (8) Where officers in receipt of an allowance granted under this clause and proceeds on:
  - (a) a period of annual leave in excess of the normal, such officers shall only receive payment of such allowance for the period of normal annual leave; and
  - (b) a period of any other approved leave of absence of more than four (4) weeks, such officers shall not be entitled to receive payment of such allowance for the whole or any part of the period of such leave.

#### 20. - HOURS

- (1) **Prescribed Hours of Duty**  
Prescribed hours of duty to be observed by officers shall be seven hours thirty minutes per day to be worked between 7.00 am and 6.00 pm Monday to Friday as determined by the employer with a lunch interval of forty-five minutes to be taken between 12.00 noon and 2.00 pm. Subject to the lunch interval prescribed hours are to be worked as one continuous period.  
Employers wishing to vary the prescribed hours of duty to be observed shall be required to give one month's notice in writing to the department, branch, section or officers to be affected by the change.
- (2) **Other Working Arrangements**
  - (a) The employer may vary the prescribed hours of duty observed in the department or any branch or section thereof so as to make provisions for:
    - (i) the attendance of officers for duty on a Saturday, Sunday, Public Holiday.
    - (ii) the performance of shift work including work on Saturdays, Sundays, Public Holidays; and
    - (iii) the nature of the duties of an officer or class of officers in fulfilling the responsibilities of their office.
 provided that where the hours of duty are so varied an officer shall not be required to work more than five hours continuously without a break.
  - (b) Notwithstanding the above, where it is considered necessary to provide more economic operations, the employer may authorise the operation of alternative working arrangements in the department, or any branch of section thereof.  
The continuing operation of any alternative working arrangements, so approved, will depend on the employer being satisfied that the efficient functioning of the department is being enhanced by its operation.  
Such alternative working arrangements shall be either:
    - (i) the operation of flexitime as specified in subclause (3) of this clause, or
    - (ii) the operation of a nine-day fortnight as specified in subclause (4) of this clause.

- (iii) The operation of permanent part-time employment as specified in Clause 9. - Part Time Employment of this Award, or
  - (iv) such other arrangement as is approved by the employer.
- (3) Flexitime Arrangements
- (a) Flexitime Roster
    - (i) The authorisation of a flexitime roster shall be the responsibility of the employer. The roster will indicate the minimum staffing and any other requirements in respect to starting and finishing times, lunch break coverage and flexi leave.
    - (ii) The roster shall cover a settlement period of four weeks and shall be made available to all affected officers no later than three days prior to the settlement period commencing.
    - (iii) The roster shall be prepared in consultation with the affected officers, subject to the employer retaining the right to determine arrangements to suit the operational needs of the department.
    - (iv) Subject to four weeks notice being given to affected officers, the employer may withdraw authorisation of a flexitime roster.
  - (b) Hours of Duty
    - (i) The prescribed hours of duty may be an average of 7 hours 30 minutes per day which may be worked with flexible commencement and finishing times in accordance with the provisions of this subclause, provided that the required hours of duty for each four week settlement period shall be 150 a multiple of 37.5 hours as set out in the flexitime agreement.
    - (ii) For the purpose of leave, Public Holidays, a day shall be credited as 7 hours 30 minutes.
  - (c) Flexitime Periods
 

Within the constraints of the prepared roster and subject to the concurrence of the supervisor, officers may select their own starting and finishing times within the following periods:

    - 7.30 am to 9.30 am
    - 12.00 noon to 2.00 pm (Minimum half an hour break)
    - 3.30 pm to 6.00 pm
  - (d) Core Periods
 

Officers must work in the following core periods unless unavoidably absent due to illness or approved leave.

    - 9.30 am to 12.00 noon
    - 2.00 pm to 3.30 pm
  - (e) Lunch Break
    - (i) An officer shall be allowed to extend the meal break between 12 noon and 2.00 pm of not less than 30 minutes but not exceeding 45 minutes except as provided below.
    - (ii) An officer may be allowed to extend the meal break beyond 45 minutes to a maximum of 90 minutes. Such an extension is subject to prior approval of the officer's supervisor.
  - (f) Flexi leave
    - (i) Within the constraints of the prepared roster and subject to the prior approval of the supervisor, an officer may be allowed a maximum of two full days or any combination of half days and full days that does not in total exceed two days in any one settlement period.
    - (ii) Approval to take flexi leave is subject to the officer having accrued sufficient credit hours to cover the absence prior to taking the leave. In exceptional circumstances and with the approval of the employer, flexi leave may be taken before accrual subject to such conditions as the employer may impose.
  - (g) Settlement Period
    - (i) shall consist of four weeks.
    - (ii) The settlement period shall commence at the beginning of a pay period.
    - (iii) The required hours of duty for a settlement period shall be 150 hours.
  - (h) Credit Hours
    - (i) Credit hours in excess of the required 150 hours to a maximum of 7 hours 30 minutes are permitted at the end of each settlement period. Such credit hours shall be carried forward to the next settlement period.
    - (ii) Credit hours in excess of 7 hours 30 minutes at the end of a settlement period shall be lost.
    - (iii) Credit hours at any point within the settlement period shall not exceed 20 hours.
  - (i) Debit Hours
    - (i) Debit hours below the required 150 hours to a maximum of 4 hours are permitted at the end of each settlement period.  
Such debit hours shall be carried forward to the next settlement period.
    - (ii) For debit hours in excess of 4 hours, officer shall be required to take leave without pay for the period necessary to reduce debit hours to those specified in subparagraph (i)(i) of this subclause.
    - (iii) Officers having excessive debit hours may be placed on standard working hours in addition to being required to take leave without pay.

- (j) **Maximum Daily Working Hours**  
A maximum of 10 hours may be worked in any one day, assuming a 7.30 am start, 6.00 pm finish and 30 minutes for lunch.
- (k) **Study Leave**  
Where the employer pursuant to the provisions of Clause 30. - Study Leave has approved study leave, credits will be given for education commitments falling within the prescribed hours of duty and for which "time off" is necessary to allow for attendance at formal classes.
- (l) **Overtime**
- (i) Officers receiving at least one day's prior notice of overtime shall be required to work the prescribed hours of duty determined by the employer under subclause (1) - Prescribed Hours of Duty of this clause.
- (ii) Where an officer is required to work overtime at the conclusion of a day with less than one day's notice, and
- (aa) where the officer has at the commencement of that day 2 hours or more flexitime credits, the officer shall be paid overtime after 5 hours work on that day, or for time worked after 3.30 pm, whichever is the later, or
- (bb) where that officer has commenced duty prior to 8.30 am and has, at the commencement of that day, less than 2 hours flexitime credits, the officer shall be paid overtime, for time worked after the completion of prescribed hours of duty or after working 7½ hours on that day, whichever is the earlier, or
- (cc) where that officer has commenced work after 8.30 am and has, at the commencement of that day, less than 2 hours flexitime credits, the officer shall be paid overtime for time worked after 5.30 pm or after working 7½ hours, on that day whichever is the earlier.
- (iii) Where an officer is required to work overtime at the beginning of a day with less than one day's notice, that officer shall be paid overtime for any time worked prior to the commencing time for prescribed hours of duty determined by the employer under subclause (1) - Prescribed Hours of duty of this clause.
- (4) **Nine Day Fortnight**
- (a) **Hours of Duty**
- (i) The employer may authorise the operation of a nine day fortnight where the prescribed hours of duty of 75 hours a fortnight are worked over nine days of the fortnight, exclusive of work performed on Saturday, Sunday and the special rostered day off, with each day consisting of 8 hours and 20 minutes.
- (ii) The employer shall determine officers' commencing and finishing times between the spread of 7.00 am and 6.00 pm, in order to ensure that departmental requirements are met on each day.
- (b) **Lunch Break**
- (i) Officers shall be allowed forty-five minutes for a meal break between 12 noon and 2.00 pm to meet departmental requirements.
- (ii) Such meal breaks shall be arranged so that adequate staff are on duty between 12 noon and 2.00 pm to meet departmental requirements.
- (c) **Special Rostered Day Off**  
Each officer shall be allowed one special rostered day off each fortnight in accordance with a roster prepared by management showing days and hours of duty and special rostered days off for each officer.
- (d) **Leave and Public Holidays.**  
For the purposes of leave and Public Holidays, a day shall be credited as 8 hours 20 minutes notwithstanding the following:
- (i) When a Public Holiday falls on an officer's special rostered day off the officer shall be granted a day in lieu of the holiday prior to the conclusion of the current fortnight.
- (ii) For a Public Holiday occurring during a period of annual leave, an additional day will be added to the period of leave irrespective of whether it falls on a rostered work day or special rostered day off.
- (iii) A four-week annual leave entitlement is equivalent to 150 hours, the equivalent to eighteen rostered working days of 8 hours 20 minutes, and two special rostered days off.
- (iv) An officer who is sick on a special rostered day off will not be granted sick leave for that day, and will not be credited with an additional day off in lieu.
- (e) **Overtime**  
The provisions of Clause 22. - Overtime Allowance of this Award shall apply for work performed prior to an officer's nominated starting time and after an officer's nominated ceasing time in accordance with subparagraph (a)(ii) and on an officer's special rostered day off.
- (f) **Study Leave**  
Credits for study leave will be given for educational commitments falling due between an officer's nominated starting and finishing times.

#### 21. - SHIFT WORK ALLOWANCE

This allowance is derived from the percentage increase in the level 1.7 weekly rate, the formula being:

$$\frac{\text{L1.7 annual salary.}}{1} \times \frac{12}{313} \times \frac{1}{10} \times \frac{12.5}{100}$$

- (1) In this Clause the following expressions shall have the following meaning:  
 "Day shift" means a shift commencing after 6.00am and before 12.00 noon.  
 "Afternoon shift" means a shift commencing at or after 12.00 noon and before 6.00pm.  
 "Night shift" means a shift commencing at or after 6.00pm and before 6.01am.  
 "Public holiday" shall mean a holiday provided in Clause 24. - Public Holidays of this Award.
- (2) (a) An officer required to work an afternoon or a night shift of seven and one half (7½) hours shall, in addition to the ordinary rate of salary, be paid an allowance in accordance with Schedule J - Shift Work Allowance of this Award.
- (b) Work performed during ordinary rostered hours on Saturdays or Sundays shall be paid for at the rate of time and one-half and on public holidays at double time and one-half. These rates shall be paid in lieu of the allowance prescribed in paragraph (2)(a) of this clause.  
 Provided that in lieu of the foregoing provisions of this subclause and subject to agreement between the employer and the officer, work performed during ordinary rostered hours on a public holiday shall be paid for at the rate of time and one-half and the officer may, in addition, be allowed a day's leave with pay to be added to annual leave or to be taken at some other time within a period of one year.
- (c) An officer rostered off duty on a public holiday shall be paid at ordinary rates for such day or, subject to agreement between the employer and the officer, be allowed a day's leave with pay in lieu of the holiday to be added to the officer's next annual leave entitlement or taken at a mutually convenient time within a period of one year.
- (d) An officer engaged on shift work who is rostered to work regularly on Sundays and/or public holidays shall be entitled to one week's leave in addition to the officer's normal entitlement to annual leave of absence for recreation.
- (e) Additional leave provided by paragraphs (b) (c) and (d) of this subclause shall not be subject to the annual leave loading prescribed by subclause (11) of Clause 23. - Annual Leave of this Award.
- (f) Work performed by an officer in excess of the ordinary hours of the officer's shift or on a rostered day off shall be paid for in accordance with the overtime provisions of Clause 22. - Overtime of this Award.
- (g) (i) When an officer begins or ceases a shift between the hours of 11.00 pm and 7.00 am and no public transport is available, reimbursement at the appropriate rate of hire prescribed by subclause (4) of Clause 47. - Motor Vehicle Allowance of this Award shall be made if the officer's private motor vehicle or cycle is used for the journey between the officer's residence and headquarters and the return journey.  
 Provided however, that any officer who, on or after October 30, 1987, elects to be permanently retained on a fixed or non rotating shift that begins or ceases between or on the hours of 11.00 pm and 7.00 am shall not be eligible to claim this reimbursement.
- (ii) The provisions of this subclause shall only be applied to officers living and working within a radius of 50km of the Perth City Railway Station.
- (3) Hours of Duty and Rosters
- (a) An officer engaged on shifts shall work a 75-hour fortnight, exclusive of meal intervals, on the basis of not more than ten (10) shifts per fortnight of not more than seven and one half hours duration. Provided that where agreement is reached between the employer and the Association the length and/or number of shifts worked per fortnight may be altered.  
 Provided that when the agreed length of a shift is extended past seven and one half hours, overtime shall be payable only for time worked in excess of the rostered shift.  
 Provided also that whenever an agreed alteration to the number of hours per shift has occurred then the allowance per shift shall be varied on a pro rata basis to reflect any variation to other than seven and one half (7½) hours.
- (b) Meal breaks shall be for a period of at least thirty (30) minutes, but not greater than one hour for each meal.
- (c) Officers may be rostered to work on any of the seven days of the week provided that no officer shall be rostered for more than six (6) consecutive days.  
 Provided that where agreement is reached between the employer and the Association, shift workers may be exempted from this provision.
- (d) The roster period shall commence at the beginning of a pay period and continue for fourteen (14) consecutive days. Rosters shall be available to officers at least five (5) clear working days prior to the commencement of the roster.
- (e) A roster may only be altered on account of a contingency, which the employer could not have been reasonably expected to foresee. When a roster is altered, the officer concerned shall be notified of the changed shift 24 hours before the changed shift commences. Provided that where such notice is not given, the officer shall be paid overtime in accordance with Clause 22. - Overtime for the duration of the changed shift. This provision shall not apply to an officer who was absent from duty on the officer's last rostered shift.
- (f) An officer shall not be rostered for duty until at least ten (10) hours have elapsed from the time the officer's previous rostered shift ended. Provided that where agreement is reached between the Association and the employer the ten (10) hour break may be reduced to accommodate special shift arrangements, except that under no circumstances shall such an agreement provide for a break of less than 8 hours.
- (g) An officer shall not be retained permanently on one shift unless the officer so elects in writing.
- (h) Officers shall be allowed to exchange shifts or days off with other officers provided the approval of the employer has been obtained and provided further that any excess hours worked shall not involve the payment of overtime.

22. - OVERTIME ALLOWANCE

- (1) For the purposes of this Clause, the following terms shall have the following meanings:
- (a) "Overtime" means all work performed only at the direction of the employer or a duly authorised officer outside the prescribed hours of duty.
  - (b) "Emergency Duty" means: duty by an officer required to return to duty, without prior notice, to meet an emergency at a time that the officer would not ordinarily have been on duty.
  - (c) "Prescribed hours of duty," means an officer's normal working hours as prescribed by the employer in accordance with Clause 20. - Hours, of this Award.
  - (d) "Duly authorised officer" means an officer or officers appointed in writing by the employer for the purpose of authorising overtime.
  - (e) "A day" shall mean from midnight to midnight.
  - (f) "Public Holiday" means the days prescribed as Public Holidays in Clause 24. - Public Holidays of this Award.
  - (g) "Ordinary travelling time" means time that an officer would have ordinarily spent in travelling once daily from the officer's home to the officer's usual headquarters and home again.
  - (h) "Excess travelling time" means all time travelled on official business outside prescribed hours of duty and away from the officer's usual headquarters in accordance with subclause (7) of this Clause.
  - (i) "Fortnightly salary" means an officer's substantive salary exclusive of any allowances such as the district allowance, personal allowance, qualifications allowance, service allowance, special allowance, or higher duties allowance unless otherwise approved by the employer. Provided that a special allowance or higher duties allowance shall be included in "fortnightly salary" when overtime is worked on duties for which these allowances are specifically paid.
  - (j) "Commutated overtime" means an agreed allowance negotiated between the Association and the employer, paid in lieu of actual overtime worked for a group of officers occupying positions which require work to be performed consistently and regularly outside and in excess of the prescribed hours of duty.
  - (k) "Out of hours contact" shall include the following:
 

STANDBY - shall mean a written instruction or other authorised direction by the employer or a duly authorised officer to an officer to remain at the officer's place of employment during any period outside the officer's normal hours of duty, and to perform certain designated tasks periodically or on an impromptu basis. Such officer shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

Other than in extraordinary circumstances, officers shall not be required to perform more than two periods of standby in any rostered week.

This provision shall not replace normal overtime or shift work requirements.

ON CALL - shall mean a written instruction or other authorised direction by the employer or a duly authorised officer to an officer rostered to remain at the officer's residence or to otherwise be immediately contactable by telephone or other means outside the officer's normal hours of duty in case of a call out requiring an immediate return to duty.

AVAILABILITY - shall mean a written instruction or other authorised direction by the employer or a duly authorised officer to an officer to remain contactable, but not necessarily immediately contactable by telephone or other means, outside the officer's normal hours of duty and be available and in a fit state at all such times for recall to duty.

"Availability" will not include situations in which officers carry telephones or other means or make their telephone numbers or other contact details available only in the event that they may be needed for casual contact or recall to work. Subject to subclause (3) of this Clause recall to work under such circumstances would constitute emergency duty in accordance with subclause (6) of this Clause.
- (2) Overtime
- (a) An officer who works overtime for a greater period than 30 minutes, shall be entitled to payment in accordance with paragraph (d) of this subclause, or time off in lieu of payment in accordance with paragraph (b) of this subclause, or any combination of payment or time off in lieu.
  - (b) Time off in lieu
    - (i) Where the officer or the employer or the duly authorised officer, so elects in writing prior to overtime being worked, time off in lieu of payment for overtime worked may be taken in accordance with the time ratios in paragraph (d) of this subclause.
    - (ii) The officer shall be required to clear accumulated time off in lieu within two months of the overtime being performed, provided that by written agreement between the officer and the employer, or duly authorised officer, time off in lieu of payment for overtime may be accumulated beyond two months from the time the overtime is performed so as to be taken in conjunction with periods of approved leave.
    - (iii) If the department is unable to release the officer to clear such leave within two months of the overtime being performed, and no further agreement prescribed in subparagraph (ii) of this paragraph is reached, then the officer shall be paid for the overtime worked.
  - (c) Commuted Allowance
 

Any commuted allowance and/or time off in lieu of overtime, other than that provided in paragraph (b) of this subclause, shall be negotiated between the Association and the employer.
  - (d) Payment for Overtime
 

Payment for overtime shall be calculated on an hourly basis in accordance with the following formula:

- (i) Weekdays  
For the first three hours worked outside the prescribed hours of duty on any one weekday at the rate of time and one half:  
i.e.  $\frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$   
After the first three hours on any one week day at the rate of double time:  
i.e.  $\frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$
- (ii) Saturdays  
For the first three hours on any Saturday, before 12.00 noon, at the rate of time and one half:  
i.e.  $\frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$   
After the first three hours or after 12.00 noon, whichever is the earlier, on any Saturday at the rate of double time:  
i.e.  $\frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$
- (iii) Sundays  
For all hours on any Sunday, at the rate of double time:  
i.e.  $\frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$
- (iv) Public Holidays  
For hours worked during prescribed hours of duty on any Public Holiday at the rate of time and one half (in addition to the normal pay for that day):  
i.e.  $\frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$   
For hours worked outside of the prescribed hours of duty on any Public Holiday at the rate of double time and a half:  
i.e.  $\frac{\text{Fortnightly Salary}}{75} \times \frac{5}{2}$
- (e) Annual Leave/Long Service Leave  
An officer directed to return to duty during periods of annual or long service leave shall be deemed to be no longer on leave for the duration of that period of duty.
- (i) If the officer is directed to return to duty during a period of leave during prescribed hours of duty, then that officer shall be recredited with that leave for the same number of hours of duty performed.
- (ii) If the officer is directed to return to duty during a period of leave outside of prescribed hours of duty, then that officer shall be entitled to payment of overtime in accordance with subclause (2) of this clause.
- (f) Time Worked Past Midnight  
Where an officer is required to work a continuous period of overtime which extends past midnight into the succeeding day the time worked after midnight shall be included with that worked before midnight for the purpose of calculation of payment provided for in this subclause.
- (g) Minimum Periods for Return to Duty
- (i) An officer, having received prior notice, who is required to return to duty:
- (aa) on a Saturday, Sunday or Public Holiday, otherwise than during prescribed hours of duty, shall be entitled to payment at the rate in accordance with paragraph (d) of this subclause for a minimum of three hours;
- (bb) before or after the prescribed hours of duty on a weekday shall be entitled to payment at the rate in accordance with paragraph (d) of this subclause for a minimum period of one and one half hours;
- (ii) For the purpose of this subclause, where an officer is required to return to duty more than once, each duty period shall stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.
- (iii) The provisions of this subparagraph shall not apply in cases where it is customary for an officer to return to the place of employment to perform a specific job outside the prescribed hours of duty, or where the overtime is continuous (subject to a meal break) with the completion or commencement of prescribed hours of duty.
- (h) Overtime at a Place Other than Usual Headquarters
- (i) When an officer is directed to work overtime at a place other than usual headquarters, and provided that the place where the overtime is to be worked is situated in the area within a radius of fifty (50)

kilometres from usual headquarters, and the time spent in travelling to and from that place is in excess of the time which an officer would ordinarily spend in travelling to and from usual headquarters, and provided such travel is undertaken on the same day as the overtime is worked, then such excess time shall be deemed to form part of the overtime worked.

- (ii) Except as provided in paragraph (e) of subclause (5) and paragraph (b) of subclause (6) of this clause, when an officer is directed to work overtime at a place other than usual headquarters, and provided that the place where the overtime is to be worked is situated outside the area within a radius of fifty (50) kilometres from usual headquarters and the time spent in travelling to and from that place is in excess of the time which the officer would ordinarily spend in travelling to and from usual headquarters, then the officer shall be granted time off in lieu of such excess time spent in actual travel in accordance with subclause (7) Excess Travelling Time of this clause.
- (i) **Ten Hour Break**
- (i) When overtime is worked, a break of not less than ten (10) hours shall be taken between the completion of work on one day and the commencement of work on the next, without loss of salary for ordinary working time occurring during such absence.
- (ii) Provided that where an officer is directed to return to or continue work without the break provided in subparagraph (i) of this paragraph then the officer shall be paid at double the ordinary rate until released from duty, or until the officer has had ten consecutive hours off duty without loss of salary for ordinary working time occurring during such absence.
- (iii) The provisions of subparagraphs (i) and (ii) of this paragraph, shall not apply to officers included in subclause (5) of this clause.
- (3) **Cases where overtime provisions do not apply**
- (a) Except as provided in paragraph (b) of this subclause, payment for overtime, or the granting of time off in lieu of overtime, or travelling time, shall not be approved in the following cases:
- (i) Officers whose maximum salary or maximum salary and allowance in the nature of salary exceeds that as determined for Level 5 as prescribed by Clauses 11. - Salaries and 12. - Salaries Specified Callings of this Award.
- (ii) Officers whose work is not subject to close supervision.
- (b) (i) Where it appears just and reasonable, the employer may approve the payment of overtime or grant time off in lieu to any officer referred to in paragraph (a) of this subclause.
- (ii) When an officer who is not subject to close supervision is directed by the employer to carry out specific duties involving the working of overtime, and provided such overtime can be reasonably determined by the officer's supervisor, then such officer shall be entitled to payment or time off in lieu of overtime worked in accordance with paragraphs (2)(d) or (2)(b) of this clause.
- (4) **Meal Allowances**
- (a) A break of 30 minutes shall be made for meals between 5.30 am and 7.30 am, between 12.00 noon and 2.00pm, and between 4.30 pm and 6.30 pm when overtime duty is being performed.
- (b) Except in the case of emergency, an officer shall not be compelled to work more than five hours overtime duty without a meal break. At the conclusion of a meal break, the calculation of the five-hour limit recommences.
- (c) An officer required to work overtime of not less than two hours, and who actually purchases a meal shall be reimbursed in accordance with Part 2 of Schedule H. - Overtime of this Award, in addition to any payment for overtime to which that officer is entitled.
- (d) An officer working a continuous period of overtime who has already purchased one meal during a meal break, shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with Part 2 of Schedule H. - Overtime, of this Award until that officer has worked a further five hours overtime from the time of the last meal break.
- (e) If an officer, having received prior notification of a requirement to work overtime, is no longer required to work overtime, then the officer shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.
- (5) **Out of Hours Contact**
- (a) Except as otherwise agreed between the employer and the Association, an officer who is required by the employer or a duly authorised officer to be on "out of hours contact" during periods off duty shall be paid an allowance in accordance with the following formulae for each hour or part thereof the officer is on "out of hours contact".

Standby	Level 2 (minimum) weekly rate	x	$\frac{1}{37.5}$	x	$\frac{37.5}{100}$
On Call	Level 2 (minimum) weekly rate	x	$\frac{1}{37.5}$	x	$\frac{18.75}{100}$
Availability	Level 2 (minimum) weekly rate	x	$\frac{1}{37.5}$	x	$\frac{18.75}{100} \times \frac{50}{100}$

Such allowances are contained in Part 1 of Schedule H. - Overtime of this Award.

Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is made in accordance with the provisions of subclause (2) of this clause when the officer is recalled to work.

- (b) When an officer is required to be "on call" or "availability" and the means of contact is to be by land line or satellite telephone fixed at the officers residence telephone the employer shall:
- (i) Where the telephone is not already installed, pay the cost of such installation.
  - (ii) Where an officer pays or contributes towards the payment of the rental of such telephone, pay the officer 1/52nd of the annual rental paid by the officer for each seven days or part thereof on which an officer is rostered to be "on call" or "availability".
  - (iii) Provided that where as a usual feature of the duties an officer is regularly rostered to be on "on call" or "availability", pay the full amount of the telephone rental.  
When an officer is required to be "on call" or "available" and the means of contact is other than a landline/satellite telephone fixed at the officer's residence, the employer shall provide the officer with the means of contact free of charge for the purposes of work related activity.
- (c) An officer shall be reimbursed the cost of all telephone calls made on behalf of the employer as a result of being on out of hours contact.
- (d) Where an officer rostered for "on call" or "availability" is recalled to duty during the period for which the officer is on "out of hours contact" then the officer shall receive payment for hours worked in accordance with subclause (2) of this clause.
- (e) Where an officer rostered for "on call" or "availability" is recalled to duty, the time spent travelling to and from the place at which duty is to be performed, shall be included with actual duty for the purposes of overtime payment.
- (f) Minimum payment provisions do not apply to an officer rostered for "out of hours contact" duty.
- (g) An officer in receipt of an "out of hours contact" allowance and who is recalled to duty shall not be regarded as having performed emergency duty in accordance with subclause (6) of this clause.
- (h) Officers subject to this clause shall, where practicable, be periodically relieved from any requirement to hold himself or herself on "standby", "on call" or "availability".
- (i) No officer shall be on out of hours contact after the last working day preceding a period of annual leave or long service leave.
- (6) **Emergency Duty**
- (a) Where an officer is required to return to duty to meet an emergency at a time when he or she would not ordinarily have been on duty, and no notice of such call was given prior to completion of usual duty on the last day of work prior to the day on which called on duty, then if called to duty:
- (i) on a Saturday, Sunday or Public Holiday, otherwise than during prescribed hours of duty he/she shall be entitled to payment at the rate in accordance with subclause (2) of this clause for a minimum period of three hours;
  - (ii) before or after the prescribed hours of duty on a weekday he/she shall be entitled to payment at the rate in accordance with subclause (2) of this clause for a minimum period of two and a half hours.
- (b) Time spent in travelling to and from the place of duty where the officer is actually recalled to perform emergency duty shall be included with actual duty performed for the purpose of overtime payment.
- (c) An officer recalled for emergency duty shall not be obliged to work for the minimum period if the work is completed in less time, provided that an officer called out more than once within any such minimum period shall not be entitled to any further payment for the time worked within that minimum period.
- (d) Where an officer is required to work beyond the minimum period on the first or subsequent recall for emergency duty, the additional time worked at the conclusion of that minimum period shall be paid in accordance with the appropriate rate in subclause (2) of this clause.
- (e) Where an officer is recalled for a second or subsequent period of emergency duty outside of the initial minimum period, the officer shall be entitled to payment for a new minimum period, and the provisions of this subclause shall be re-applied.
- (f) For the purpose of this subclause, no claim for payment shall be allowed in respect of any emergency duty, including travelling time, which amounts to less than 30 minutes.
- (7) **Excess Travelling Time**
- An officer eligible for payment of overtime, who is required to travel on official business outside normal working hours and away from usual headquarters shall be granted time off in lieu of such actual time spent in travelling at equivalent or ordinary rates on weekdays and at time and one half rates on Saturdays, Sundays and Public Holidays, otherwise than during prescribed hours of duty, provided that:
- (a) such travel is undertaken at the direction of the employer;
  - (b) such travel shall not include:
    - (i) time spent in travelling by an officer on duty at a temporary headquarters to the officer's home for weekends for the officer's own convenience;
    - (ii) time spent in travelling by plane between the hours of 11.00 pm and 6.00 am;
    - (iii) time spent in travelling by train between the hours of 11.00 pm and 6.00 am;
    - (iv) time spent in travelling by ship when meals and accommodation are provided;
    - (v) time spent in travel resulting from the permanent transfer or promotion of an officer to a new location;
    - (vi) time of travelling in which an officer is required by the department to drive, outside ordinary hours of duty, a departmental vehicle or to drive the officer's own motor vehicle involving the payment of mileage allowance, but such time shall be deemed to be overtime and paid in accordance with subclause (2) of this clause. Passengers, however, are entitled to the provisions of this subclause (7) of this clause;

- (vii) time spent in travelling to and from the place at which overtime or emergency duty is performed, when that travelling time is already included with actual duty time for the payment of overtime.
- (c) Time off in lieu will not be granted for periods of less than 30 minutes.
- (d) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty, which is in excess of the officer's ordinary travelling time.
- (e) Where the urgent need to travel compels an officer to travel during the officer's usual lunch interval such additional travelling time is not to be taken into account in computing the number of hours of travelling time due.
- (f) In the case of an officer absent from usual headquarters, not involving an overnight stay, the time spent by the officer, outside the prescribed hours of duty, in waiting between the time of arrival at place of duty and the time of commencing duty, and between the time of ceasing duty and the time of departure by the first available transport shall be deemed to be excess travelling time.
- (g) In the case of an officer absent from usual headquarters that does involve an overnight stay, the time spent by the officer, outside the prescribed hours of duty, in waiting between the time of ceasing duty on the last day and the time of departure by the first available transport shall be deemed to be excess travelling time.

(8) Special Conditions

Any group of officers whose duties necessarily entail special conditions of employment shall not be subject to the prescribed hours of duty as defined in Clause 20. - Hours of this Award if the employer so determines. Provided, however, that such a determination shall not abrogate the right of the Association to make a claim or claims on behalf of such a group.

23. - ANNUAL LEAVE

(1) Definitions:

- (a) Accrued leave - is the leave an officer is entitled to from a previous calendar year.
- (b) Pro-rata leave - is the proportion of leave that an officer is entitled to in the current year, either from the date of commencement, or to the date of cessation.

(2) Entitlement

- (a) Each officer is entitled to four weeks paid leave for each year of service. Annual leave shall be calculated on a calendar year basis commencing on January 1 in each year.
- (b) An officer employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent officer. An officer employed on a fixed term contract or on a part time basis for a period less than 12 months, shall be credited with the same entitlement on a pro-rata basis for the period of the contract.
- (c) On written application, an officer shall be paid salary in advance when proceeding on annual leave.
- (d) The provisions of this clause do not apply to Casual Officers.

(3) Pro rata Annual Leave

(a) Entitlement

- (i) An officer who enters the Public Service after January 1 is entitled to pro rata annual leave for that year, calculated in accordance with the following formula:

Completed Calendar Months of Service	Pro Rata Annual Leave (Working Days)
1	2
2	3
3	5
4	7
5	8
6	10
7	12
8	13
9	15
10	17
11	18

- (ii) Provided that in the first and last months of an officers service the officer is entitled to pro rata annual leave of one working day for each two completed weeks of service.
- (iii) For the purposes of this paragraph, an officer who commences on the first working day of a month and works for the remainder of the month an officer who has worked throughout a month and terminates on the last working day of a month shall be regarded as having completed that calendar month of service.
- (b) An officer may take annual leave during the calendar year in which it accrues or anytime thereafter, but the time during which the leave may be taken is subject to the approval of the employer.
- (c) An officer who has been permitted to proceed on annual leave and who ceases duty before completing the required continuous service to accrue the leave, must refund the value of the unearned pro rata portion, calculated at the rate of salary as at the date the leave was taken, but no refund is required in the event of the death of an officer.

- (4) Part-time entitlement  
A part-time officer shall be granted annual leave in accordance with this clause, however payment to a part-time officer proceeding on annual leave shall be calculated having regard for any variations to the officer's ordinary working hours during the accrual period.
- (5) Compaction of Annual Leave  
An officer who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the officer's ordinary working hours at the time of commencement of annual leave, may elect to take a lesser period of annual leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of annual leave.
- (6) Additional leave for the North West
- Officers whose headquarters are located north of 26o South Latitude shall receive an additional five working days annual leave on the completion of each year of continuous service in the region.
  - An officer who proceeds on annual leave before having completed the necessary year of continuous service may be given approval for the additional five working days leave provided the leave is taken at departmental convenience and provided the officer returns to that region to complete the necessary service.
  - Where an officer has served continuously for at least a year north of the 26o South Latitude, and leaves the region because of promotion or transfer, a pro rata annual leave credit to be cleared at departmental convenience shall be approved on the following basis:

Completed months of continuous service in the region after the initial year's service	Pro Rata additional annual leave (working days)
1	NIL
2	NIL
3	1
4	1
5	2
6	2
7	2
8	3
9	3
10	4
11	4

- Where payment in lieu of pro rata annual leave is made on the death, resignation or retirement of an officer in the region, in addition to the payment calculated on a four week basis, payment may be made for the pro rata entitlement contained in subclause (3) of this clause.
- (7) Other Additional Leave  
Every officer other than an officer referred to in subclause (6) of this clause, to whom the employer has granted annual leave in excess of four weeks because of special circumstances shall be credited with such additional leave on a pro rata basis according to the following table.

Completed months of Service	Pro rata annual leave (working days)	
	5 additional days	10 additional days
1	Nil	Nil
2	Nil	1
3	1	2
4	1	3
5	2	4
6	2	5
7	2	5
8	3	6
9	3	7
10	4	8
11	4	9

- (8) Portability
- Where an officer was, immediately prior to being employed in the Public Service, employed in:
 

Any Western Australian State body or statutory authority as prescribed in Administrative Instruction 611,

The employer shall approve portability of accrued and pro rata annual leave entitlements held at the date the officer ceased that previous employment, provided that:

    - the officer's employment with the Public Service commenced no later than one week after ceasing the previous employment; and
    - the officer was not paid out all or part of the accrued and pro rata annual leave entitlements held at the time of ceasing that previous employment.
- (9) The employer may direct an officer to take accrued annual leave and may determine the date on which such leave shall commence. Should the officer not comply with the direction, disciplinary action may be taken against the officer.
- (10) Annual Leave Travel Concessions

- (a) Officers stationed in remote areas
- (i) The travel concessions contained in the following table are provided to officers and their dependents when proceeding on annual leave to either Perth or Geraldton from headquarters situated in District Allowance Areas 3, 5 and 6, and in that portion of Area 4 located north of 30° South latitude.
  - (ii) Officers are required to serve a year in these areas before qualifying for travel concessions. However, officers who have less than a year's service in these areas and who are required to proceed on annual leave to suit departmental convenience will be allowed the concessions. The concession may also be given to an officer who proceeds on annual leave before completing the year's service provided that the officer returns to the area to complete the year's service at the expiration of the period of leave.
  - (iii) The mode of travel is to be at the discretion of the employer.
  - (iv) Travel concessions not utilised within twelve months of becoming due will lapse.
  - (v) Part-time officers are entitled to travel concessions on a pro rata basis according to the usual number of hours worked per week.

Travelling time shall be calculated on a pro rata basis according to the number of hours worked.

	Approved Mode of Travel	Travel Concession	Travelling Time
(aa)	Air	Air fare for the Officer, and partner and dependent children	One day each way
(bb)	Road	Full motor vehicle allowance rates, but reimbursement not to exceed the cost of the return air fare for the Officer, partner and dependent children, travelling in the motor vehicle.	North of 20° South Latitude - two and one half days each way. Remainder - two days each way.
(cc)	Air and Road	Full motor vehicle allowance rates for car trip, but reimbursement not to exceed the cost of the return air fare for the Officer. Air fares for the partner and dependent children.	North of 20° South Latitude - two and one half days each way. Remainder - two days each way.

- (b) Officers whose headquarters are located 240 kilometres or more from Perth
- (i) Officers, other than those designated in paragraph (10)(a) whose headquarters are situated two hundred and forty kilometres or more from Perth General Post Office and who travel to Perth for their annual leave may be granted by the employer reasonable travelling time to enable them to complete the return journey.

(11) Leave Loading

- (a) Subject to the provisions of paragraphs (c) and (g) of this subclause, a loading equivalent to 17.5% of normal salary is payable to officers proceeding on annual leave, including accumulated annual leave.
- (b) Subject to the provisions of paragraphs (c) and (g) of this subclause, shift workers who are granted an additional week's penalty leave when proceeding on annual leave including accumulated annual leave shall be paid:
  - (i) shift and weekend penalties the officer would have received had the officer not proceeded on annual leave, or
  - (ii) a loading equivalent to 20% of normal salary for five weeks leave; whichever is the greater.
- (c) Maximum Loading
  - (i) Subject to the provisions of paragraph (e) of this subclause the loading is paid on a maximum of four weeks annual leave, or five weeks in the case of shift workers who are granted an additional weeks penalty leave. Payment of the loading is not made on additional leave granted for any other purpose (eg to officers whose headquarters are located North of the 26° South Latitude).
  - (ii) Maximum payment shall not exceed the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences.
  - (iii) Maximum payment to shift workers who are granted an additional weeks penalty leave shall not exceed 5/4th of the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences.
- (d) Annual leave commencing in any year and extending without a break into the following year attracts the loading calculated on the salary applicable on the day the leave commenced.
- (e) The loading payable on approved accumulated annual leave shall be at the rate applicable at the date the leave is commenced. Under these circumstances an officer can receive up to the maximum loading for the approved accumulated annual leave in addition to the loading for the current year's entitlement.
- (f) A pro rata loading is payable on periods of approved annual leave less than four weeks.
- (g) The loading is calculated on the rate of the normal fortnightly salary including any allowances, which are paid as a regular fortnightly or annual amount. Any allowance paid to an officer for undertaking additional or higher level duties is only included if the allowance is payable during that period of normal annual leave as provided in subclauses (6) and (7) of Clause 19. - Higher Duties Allowance of this Award.
- (h) Where payment in lieu of accrued or pro rata annual leave is made on the death or retirement of an officer, a loading calculated in accordance with the terms of this clause is to be paid on accrued and pro rata annual leave.
- (i) When an officer resigns, or ceases employment, or where an officer is dismissed under Part V Discipline, of the Public Sector Management Act 1994, an annual leave loading shall be paid as follows:

- (i) Accrued entitlements to annual leave – a loading calculated in accordance with the terms of this clause for accrued annual leave is to be paid.
- (ii) Pro rata annual leave – no loading is to be paid.
- (j) Part-time officers shall be paid a proportion of the annual leave loading at the salary rate applicable, provided that the maximum loading payable shall be calculated in accordance with the following:

$$\frac{\text{Hours of work per fortnight}}{75} \times \frac{\text{Maximum loading in accordance with subparagraph c(ii) of this clause}}{1}$$

- (k) An officer who has been permitted to proceed on annual leave and who ceases duty other than by resignation or dismissal under Part V – Discipline of the Public Sector Management Act 1994, before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion of Leave Loading but no refund is required in the event of the death of an officer.
- (l) An officer who has been permitted to proceed on annual leave and who resigns or is dismissed under Part V – Discipline, of the Public Sector Management Act 1994 must refund the value of the loading paid for leave other than accrued leave.
- (m) The loading does not apply to Cadets on full time study.

#### 24. - PUBLIC HOLIDAYS

- (1) The following days shall be allowed as holidays with pay:
  - (a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Sovereign's Birthday, Foundation Day, Labour Day, provided that the employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.
- (2) When any of the days mentioned in subclause (1) of this clause falls on a Saturday or on a Sunday, the holiday shall be observed on the next succeeding Monday.  
When Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next succeeding Tuesday.  
In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

#### 25. - LONG SERVICE LEAVE

- (1) Each officer who has completed:
  - (a) A period of 7 years of continuous service in a permanent and/or fixed term contract capacity; or
  - (b) 10 years of continuous service in a temporary capacity;
 shall be entitled to 13 weeks of long service leave on full pay.  
Officers may by agreement with their employer, clear any accrued entitlement to long service leave in one-week periods.
- (2) Where an officer has continuous service in both a temporary and permanent capacity the date on which the officer shall become entitled to long service leave shall be determined by taking into account on a proportional basis the periods of temporary and permanent service.  
The category of temporary officer ceased on 1 October 1994 with the repeal of the *Public Service Act 1978*.
- (3) Each officer is entitled to an additional 13 weeks of long service leave on full pay for each subsequent period of 7 years of continuous service.
- (4) A part-time officer shall have the same entitlement to long service leave, as full time officers however payment made during such periods of long service leave shall be adjusted according to the hours worked by the officer during that accrual period.
- (5) For the purpose of determining an officer's long service leave entitlement, the expression "continuous service" includes any period during which the officer is absent on full pay or part pay from duties in the Public Service, but does not include:
  - (a) any period exceeding two weeks during which the officer is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;
  - (b) any period during which an officer is taking long service leave entitlement or any portion thereof except in the case of subclause (10) when the period excised will equate to a full entitlement of 13 weeks;
  - (c) any service by an officer who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service has actually entitled the officer to the long service leave under this clause;
  - (d) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave;
  - (e) any service of a Cadet whilst undertaking full time studies.
- (6) A long service leave entitlement, which fell due prior to March 16, 1988, amounted to three months. A long service leave entitlement, which falls due on or after that date, shall amount to thirteen weeks.
- (7) Any Public Holiday or days in lieu of the repealed public service holidays occurring during an officers absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.
- (8) The employer may direct an officer to take accrued long service leave and may determine the date on which such leave shall commence. Should the officer not comply with the direction, disciplinary action may be taken against the officer.
- (9) An officer who has elected to retire at or over the age of 55 years and who will complete not less than 12 months continuous service before the date of retirement may take application to the employer to take pro rata long service leave before the date of retirement, based on continuous service of a lesser period than that prescribed by this clause for a long service entitlement.

- (10) **Compaction of leave**
- (a) An officer who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the officer's ordinary working hours at the time of commencement of long service leave, may elect to take a lesser period of long service leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of long service leave.
- (b) Notwithstanding subclause (6) of this clause, an officer who has elected to compact an accrued entitlement to long service leave in accordance with paragraph (10)(a) of this clause, shall only take such leave in any period on full pay, and the period excised as "continuous service" shall be 13 weeks.
- (11) **Portability**
- (a) Where an officer was, immediately prior to being employed in the Public Service, employed in the service of:
- The Commonwealth of Australia, or
  - Any other State Government of Australia, or
  - Any Western Australian State body or statutory authority prescribed in Administrative Instruction 611
- and the period between the date when the officer ceased previous employment and the date of commencing employment in the Public Service does not exceed one week, that officer shall be entitled to long service leave determined in the following manner:
- (i) the pro rata portion of long service leave to which the officer would have been entitled up to the date of appointment under the Public Sector Management Act 1994, shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the officer may become entitled under this clause; and
- (ii) the balance of the long service leave entitlement of the officer shall be calculated upon appointment to the Public Service in accordance with the provisions of this clause.
- (b) Nothing in this clause confers or shall be deemed to confer on any officer previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the officer's favour prior to the date on which the officer commenced employment in the Public Service.
- (12) **Half Pay**
- Subject to the employer's convenience, an employer may approve an officer's application to take long service leave on full pay or half pay. In the case of long service leave which falls due on or after March 16, 1988 portions in excess of four weeks shall be in multiples of one week's entitlement.

#### 26. - SICK LEAVE

- (1) **Entitlement**
- (a) The employer shall credit each permanent officer with the following sick leave credits, which shall be cumulative:
- |  | Sick Leave on full pay | Sick Leave on half pay |
|--|------------------------|------------------------|
| On the day of initial appointment  | 37.5 hours             | 15 hours               |
| On completion of 6 months continuous service                             | 37.5 hours             | 22.5 hours             |
| On the completion of 12 months continuous service                        | 75 hours               | 37.5 hours             |
| On the completion of each further period of 12 months continuous service | 75 hours               | 37.5 hours             |
- (b) An officer employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent officer. An officer employed on a fixed term contract for a period less than 12 months, shall be credited with the same entitlement on a pro rata basis for the period of the contract.
- (c) A part-time officer shall be entitled to the same sick leave credits, on a pro rata basis according to the number of hours worked each fortnight. Payment for sick leave shall only be made for those hours that would normally have been worked had the officer not been on sick leave.
- (d) The provisions of this clause do not apply to casual officers.
- (2) **Evidence**
- (a) An application for sick leave exceeding two consecutive working days shall be supported by evidence to satisfy a reasonable person.
- (b) The amount of sick leave granted without the production of evidence to satisfy reasonable person required in paragraph (a) of this subclause shall not exceed, in the aggregate, 5 working days in any one-credit year.
- (3) Where the employer has occasion for doubt as to the cause of the illness or the reason for the absence, the employer may arrange for a registered medical practitioner to visit and examine the officer, or may direct the officer to attend the medical practitioner for examination. If the report of the medical practitioner does not confirm that the officer is ill, or if the officer is not available for examination at the time of the visit of the medical practitioner, or fails, without reasonable cause, to attend the medical practitioner when directed to do so, the fee payable for the examination, appointment or visit shall be paid by the officer.
- (4) If the employer has reason to believe that an officer is in such a state of health as to render a danger to fellow officers or the public, the officer may be required to obtain and furnish a report as to their condition from registered medical practitioner nominated by the employer. The fee for any such examination shall be paid by the employer.
- (5) Where an officer is ill during the period of annual leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that as a result of the illness the officer was confined to their place of

- residence or a hospital for a period of at least seven consecutive calendar days, the employer may grant sick leave for the period during which the officer was so confined and reinstate annual leave equivalent to the period of confinement.
- (6) Where an officer is ill during the period of long service leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that as a result of illness the officer was confined to their place of residence or a hospital for a period of at least 14 consecutive calendar days, the employer may grant sick leave for the period during which the officer was so confined and reinstate long service leave equivalent to the period of confinement.
- (7) An officer who is absent on leave without pay is not eligible for sick leave during the currency of that leave without pay.
- (8) No sick leave shall be granted with pay, if the illness has been caused by the misconduct of the officer or in any case of absence from duty without sufficient cause.
- (9) Where an officer who has been retired from the Public Service on medical grounds resumes duty therein, sick leave credits at the date of retirement shall be reinstated. This provision does not apply to an officer who has resigned from the Public Service and is subsequently reappointed.
- (10) **Workers Compensation**  
Where an officer suffers a disability within the meaning of section 5 of the Workers Compensation & Rehabilitation Act 1981, which necessitates that officer being absent from duty, sick leave with pay shall be granted to the extent of sick leave credits. In accordance with section 80(2) of the Workers Compensation & Rehabilitation Act 1981 where the claim for worker's compensation is decided in favour of the officer, sick leave credit is to be reinstated and the period of absence shall be granted as sick leave without pay.
- (11) **War Caused Illnesses**  
(a) An officer who produces a certificate from the Department of Veterans' Affairs stating that the officer suffers from war caused illness may be granted special sick leave credits of 112 hours 30 minutes (15 standard hour days) per annum on full pay in respect of that war caused illness. These credits shall accumulate up to a maximum credit of 337 hours and 30 minutes (45 standard hour days), and shall be recorded separately to the officer's normal sick leave credit.  
(b) Every application for sick leave for war caused illness shall be supported by a certificate from a registered medical practitioner as to the nature of the illness.
- (12) **Portability**  
(a) The employer shall credit an officer additional sick leave credits up to those held at the date that officer ceased previous employment provided:  
(i) immediately prior to commencing employment in the Public Service of Western Australia, the officer was employed in the service of:  
The Commonwealth Government of Australia, or  
Any other State of Australia, or  
In a State body or statutory authority prescribed by Administrative Instruction 611;  
(ii) the officer's employment with the Public Service of Western Australia commenced no later than one week after ceasing previous employment.  
(b) The maximum break in employment permitted by subparagraph (a)(ii) of this subclause, may be varied by the approval of the employer provided that where employment with the Public Service of Western Australia commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the officer ceased with the previous employer.

#### 27. - CARERS LEAVE

- (1) An officer is entitled to use, each year, up to five (5) days of the officer's sick leave entitlement per year to be the primary care giver of a member of the officer's family or household who is ill or injured and in need of immediate care and attention.
- (2) Officers shall, wherever practical, give the employer notice of the intention to take carers leave and the estimated length of absence. If it is not practicable to give prior notice of absence officers shall notify the employer as soon as possible on the first day of absence.
- (3) Officers shall provide, where required by the employer, evidence to establish the requirement to take carers leave. An application for carers leave exceeding two (2) consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.
- (4) The definition of family shall be the definition contained in the WA Equal Opportunity Act 1984. That is, a person who is related to the officer by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the officer.
- (5) Carers leave may be taken on an hourly basis or part thereof.

#### 28. - PARENTAL LEAVE

- (1) **Definition**  
"Officer" includes full time, part time, permanent and fixed term contract officers.  
"Primary Care Giver" is the officer who will assume the principal role for the care and attention of a child/children. The employer may require confirmation of primary care giver status.  
"Replacement Officer" is an officer specifically engaged to replace an officer proceeding on parental leave.  
"Partner" means a person who is a spouse or de facto partner.  
"Public sector" means an employing authority as defined in Section 5 of the Public Sector Management Act 1994.
- (2) **Entitlement to Parental and Partner Leave**

- (a) An officer is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:
    - (i) birth of a child to the officer or the officer's partner; or
    - (ii) adoption of a child who is not the child or the stepchild of the officer or the officer's partner; is under the age of five (5); and has not lived continuously with the officer for six (6) months or longer.
  - (b) An officer identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to six (6) weeks paid parental leave. Paid parental leave will form part of the 52-week entitlement provided in subclause (2) (a) of this clause.
  - (c) A pregnant officer can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.
  - (d) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed six (6) weeks.
  - (e) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.
  - (f) Parental leave may not be taken concurrently by an officer and his or her partner except under special circumstances and with the approval of the employer.
  - (g) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.
  - (h) An officer may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.
  - (i) An officer is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.
- (3) Partner Leave
- An officer who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.
- (4) Birth of a child
- (a) An officer shall provide the employer with a medical certificate from a registered medical practitioner naming the officer, or the officer's partner confirming the pregnancy and the estimated date of birth.
  - (b) If the pregnancy results in other than a live child or the child dies in the six weeks immediately after the birth, the entitlement to paid parental leave remains intact.
- (5) Adoption of a child
- (a) An officer seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Officers working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The officer may take any paid leave entitlement in lieu of this leave.
  - (b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Officers may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.
- (6) Other leave entitlements
- (a) An officer proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.
  - (b) Subject to all other leave entitlements being exhausted an officer shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The employer's approval is required for such an extension.
  - (c) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave will not exceed two (2) years.
  - (d) An officer on parental leave is not entitled to paid sick leave and other paid absences other than as specified in subclause (6) (a) and (6) (e).
  - (e) Should the birth or adoption result in other than the arrival of a living child, the officer shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.
  - (f) Where a pregnant officer not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the officer may take any paid sick leave to which the officer is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.
- (7) Notice and Variation
- (a) The officer shall give not less than four (4) weeks notice in writing to the employer of the date the officer proposes to commence paid or unpaid parental leave stating the period of leave to be taken.
  - (b) An officer seeking to adopt a child shall not be in breach of subclause (7) (a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.
  - (c) An officer proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

- (8) **Transfer to a Safe Job**  
Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the pregnant officer make it inadvisable for the officer to continue in her present duties, the duties shall be modified or the officer may be transferred to a safe position at the same classification level until the commencement of parental leave.
- (9) **Replacement Officer**  
Prior to engaging a replacement officer the employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the officer on parental leave.
- (10) **Return to Work**
- (a) An officer shall confirm the intention to return to work by notice in writing to the employer not less than four (4) weeks prior to the expiration of parental leave.
  - (b) Where an employer has made a definite decision to introduce major changes that are likely to have a significant effect on the officer's position the employer shall notify the officer while they are on parental leave.
  - (c) An officer on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the officer's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the officer was transferred to a safe job the officer is entitled to return to the position occupied immediately prior to transfer.
  - (d) An officer may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time provisions of the relevant award and agreement.
  - (e) Officers who return to work on a part time basis have access to the right of reversion provisions of Clause 9. – Part-Time Employment.
- (11) **Effect of Parental Leave on the Contract of Employment**
- (a) An officer employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.
  - (b) Paid parental leave will count as qualifying service for all purposes under the relevant award and agreement. Absence on unpaid parental leave shall not break the continuity of service of officers but shall not be taken into account in calculating the period of service for any purpose under the relevant award and agreement.
  - (c) An officer on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the relevant award and agreement.
  - (d) An employer shall not terminate the employment of an officer on the grounds of the officer's application for parental leave or absence on parental leave but otherwise the rights of the employer in respect of termination of employment are not affected.

#### 29. - LEAVE WITHOUT PAY

- (1) Subject to the provisions of subclause (2) of this clause, the employer may grant an officer leave without pay for any period and is responsible for that officer on their return.
- (2) Every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:
  - (a) The work of the department is not inconvenienced; and
  - (b) All other leave credits of the officer are exhausted.
- (3) An officer on a fixed term contract may not be granted leave without pay for any period beyond that officer's approved period of engagement.

#### 30. - STUDY LEAVE

- (1) **Conditions for Granting Time Off**
  - (a) An officer may be granted time off with pay for study purposes at the discretion of the employer.
  - (b) Part-time officers are entitled to study leave on the same basis as full time officers.
  - (c) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.
  - (d) Officers who are obliged to attend educational institutions for compulsory block sessions, may be granted time off with pay including travelling time up to the maximum annual amount allowed in subclause (1) (c) of this clause.
  - (e) Officers shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.
  - (f) In every case the approval of time off to attend lectures and tutorials will be subject to:
    - (i) agency convenience;
    - (ii) the course being undertaken on a part-time basis;
    - (iii) officers undertaking an acceptable formal study load in their own time;
    - (iv) officers making satisfactory progress with their studies;
    - (v) the course being of value to the agency; and
    - (vi) the employer's discretion when the course is only relevant to the officer's career in the Service and being of value to the State.
  - (g) A service agreement or bond will not be required.

- (2) Payment of Fees
- (a) Agencies are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a University or College of Advanced Education. Officers who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.
  - (b) This assistance does not include the cost of textbooks or Guild and Society fees.
  - (c) An officer who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.
- (3) Approved Courses
- (a)
    - (i) First-degree or associate diploma courses at a University within the state of Western Australia.
    - (ii) First degree or associate diploma courses at a college of advanced education.
    - (iii) Diploma courses at Technical and Further Education (TAFE).
    - (iv) Two-year full time Certificate courses at TAFE.
    - (v) Courses recognised by the National Authority for the Accreditation of Translators and Interpreters (NAATI) in a language relevant to the needs of the Public Sector.
  - (b) Except as outlined in subclause (3)(d) of this clause, officers are not eligible for study assistance if they already possess one of the qualifications specified in subclause (3)(a)(i) and 3(a)(ii) of this clause.
  - (c) An officer who has completed a Diploma through TAFE is eligible for study assistance to undertake a degree course at a University within the state of Western Australia or a College of Advanced Education. An officer who has completed a two year full time Certificate through TAFE is eligible for study assistance to undertake a Diploma course specified in subclause (3)(a)(iii) or a degree or associate diploma course specified in subclause (3)(a)(i) or (3)(a)(ii) of this clause.
  - (d) Assistance towards additional qualifications including second or higher degrees may be granted in special cases, at the discretion of the employer.
- (4)
- (a) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the officer's own time, except in special cases such as where the officer is in the final year of study and requires less time to complete the course, or the officer is undertaking the recommended part-time year or stage and this does not entail five hours formal study.
  - (b) A first degree or Associate Diploma course does not include the continuation of a degree or Associate Diploma towards a higher postgraduate qualification.
  - (c) In cases where officers are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.
  - (d) In agencies which are operating on flexi-time, time spent attending or travelling to or from formal classes for approved courses between 8.15 am and 4.30 pm, less the usual lunch break, and for which "time off" would usually be granted, is to be counted as credit time for the purpose of calculating total hours worked per week.
  - (e) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the officer's normal place of work.
  - (f) An officer shall not be granted more than 5 hours time off with pay per week except in exceptional circumstances where the employer may decide otherwise.
  - (g) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.
- (5) Subject to the provisions of subclause (6) of this clause, the employer may grant an officer full time study leave with pay to undertake:
- (a) post graduate degree studies at Australian or overseas tertiary education institutions; or
  - (b) study tours involving observations and/or investigations; or
  - (c) a combination of postgraduate studies and study tour.
- (6) Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:
- (a) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclause (1) to (5) of this clause and the Leave Without Pay provisions of this Award.
  - (b) It must be a highly specialised course with direct relevance to the officer's profession.
  - (c) It must be highly relevant to the agency's corporate strategies and goals.
  - (d) The expertise or specialisation offered by the course of study should not already be available through other officers employed within the agency.
  - (e) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an officer is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.
  - (f) A fixed term contract officer may not be granted study leave with pay for any period beyond that officer's approved period of engagement.
- (7) Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.
- (8) Where an outside award is granted and the studies to be undertaken are considered highly desirable by an employer, financial assistance to the extent of the difference between the officer's normal salary and the value of the award may be

considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of salary may be approved at the discretion of the employer.

- (9) The employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.
- (10) Where recipients are in receipt of a living allowance, this amount should be deducted from the officer's salary for that period.
- (11) Where the employer approves full time study leave with pay the actual salary contribution forms part of the agency's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.
- (12) Where study leave with pay is approved and the employer also supports the payment of transit costs and/or an accommodation allowance, the employer will gain approval for the transit and accommodation costs as required.
- (13) Where officers travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the employer together with some local transit and accommodation expenses providing it meets the requirements of subclause (6) of this clause. Each case is to be considered on its merits.
- (14) The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for officers under this Award.

### 31. - SHORT LEAVE

- (1)
  - (a) An employer may, upon sufficient cause being shown, grant an officer short leave on full pay not exceeding 15 consecutive working hours, but any leave granted under the provisions of this clause shall not exceed, in the aggregate, 22½ hours in any one calendar year.
  - (b) Part-time officers are eligible for short leave in accordance with this clause, on a pro rata basis calculated in accordance with the following formula:
 
$$\frac{\text{Hours worked per fortnight}}{75} \times \frac{22.5 \text{ hours}}{1}$$
  - (c) An officer employed on a fixed term contract of less than twelve months shall be eligible for pro rata short leave in accordance with this clause.
- (2) Subject to the prior approval of the supervisor, officers located outside a radius of fifty (50) kilometres from the Perth City Railway Station shall be allowed Short Leave where pressing personal matters can only be dealt with within the required hours of duty.

### 32. - BEREAVEMENT LEAVE

- (1) Officers including casuals shall on the death of:
  - the spouse or de-facto partner of the officer;
  - the child or step-child of the officer;
  - the parent or step-parent of the officer;
  - the brother, sister, step brother or step sister; or
  - any other person who, immediately before that person's death, lived with the officer as a member of the officer's family;
 be eligible for up to two (2) days paid bereavement leave, provided that at the request of an officer the employer may exercise a discretion to grant bereavement leave to an officer in respect of some other person with whom the officer has a special relationship.
- (2) The two (2) days need not be consecutive.
- (3) Bereavement leave is not to be taken during any other period of leave.
- (4) Payment of such leave may be subject to the officer providing evidence of the death or relationship to the deceased, satisfactory to the employer.
- (5) An officer requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the officer's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the officer is eligible, have immediate access to annual leave and/or accrued long service leave in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

### 33. - CULTURAL/CEREMONIAL LEAVE

- (1) Cultural/ceremonial leave shall be available to all officers.
- (2) Such leave shall include leave to meet the officer's customs, traditional law and to participate in cultural and ceremonial activities.
- (3) Officers are entitled to time off without loss of pay for cultural /ceremonial purposes, subject to agreement between the employer and officer and sufficient leave credits being available.
- (4) The employer will assess each application for ceremonial /cultural leave on its merits and give consideration to the personal circumstances of the officer seeking the leave.
- (5) The employer may request reasonable evidence of the legitimate need for the officer to be allowed time off.
- (6) Cultural /ceremonial leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from:
  - (a) the officer's annual leave entitlements;
  - (b) accrued days off or time in lieu; or
  - (c) short leave when entitlements under subclauses (a) and (b) have been fully exhausted.
- (7) Time off without pay may be granted by arrangement between the employer and the officer for cultural/ceremonial purposes.

34. - BLOOD/PLASMA DONORS LEAVE

- (1) Subject to operational requirements, officers shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:  
prior arrangements with the supervisor has been made and at least two (2) days' notice has been provided; or  
the officer is called upon by the Red Cross Blood Centre.
- (2) The notification period shall be waived or reduced where the supervisor is satisfied that operations would not be unduly affected by the officer's absence.
- (3) The officer shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.
- (4) Officers shall be entitled to two (2) hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.

35. - EMERGENCY SERVICE LEAVE

- (1) Subject to operational requirements, paid leave of absence shall be granted by the employer to an officer who is an active volunteer member of State Emergency Service Units, St John Ambulance Brigade, Volunteer Fire and Rescue Service Brigades, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or FESA Units, in order to allow for attendance at emergencies as declared by the recognised authority.
- (2) The employer shall be advised as soon as possible by the officer, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.
- (3) The officer must complete a leave of absence form immediately upon return to work.
- (4) The application form must be accompanied by a certificate from the emergency organisation certifying that the officer was required for the specified period.
- (5) An officer, who during the course of an emergency, volunteers their services to an emergency organisation, shall comply with subclauses (2), (3) and (4).

36. - UNION FACILITIES FOR UNION REPRESENTATIVES

- (1) The employer recognises the rights of the union to organise and represent its members. Union representatives in the agency have a legitimate role and function in assisting the union in the tasks of recruitment, organising, communication and representing members' interests in the workplace, agency and union electorate.
- (2) The employer recognises that, under the union's rules, union representatives are members of an Electorate Delegates Committee representing members within a union electorate. A union electorate may cover more than one agency.
- (3) The employer will recognise union representatives in the agency and will allow them to carry out their role and functions.
- (4) The union will advise the employer in writing of the names of the union representatives in the agency.
- (5) The employer shall recognise the authorisation of each union representative in the agency and shall provide them with the following:
  - (a) Paid time off from normal duties to perform their functions as a union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the electorate delegates committee and to attend union business in accordance with clause 37 - Leave to Attend Union Business of the Award.
  - (b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal agency protocols.
  - (c) A noticeboard for the display of union materials including broadcast email facilities.
  - (d) Paid access to periods of leave for the purpose of attending union training courses in accordance with clause 38 - Trade Union Training Leave of the Award. Country representatives will be provided with appropriate travel time.
  - (e) Notification of the commencement of new officers, and as part of their induction, time to discuss the benefits of union membership with them.
  - (f) Access to awards, agreements, policies and procedures.
  - (g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.
- (6) The employer recognises that it is paramount that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.

37. - LEAVE TO ATTEND ASSOCIATION BUSINESS

- (1) The employer shall grant paid leave at the ordinary rate of pay during normal working hours to an officer:
  - (a) who is required to attend or give evidence before any Industrial Tribunal;
  - (b) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;
  - (c) when prior arrangement has been made between the Union and the employer for the officer to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and
  - (d) who as a Union-nominated representative is required to attend joint union/management consultative committees or working parties.
- (2) The granting of leave is subject to convenience and shall only be approved:
  - (a) where reasonable notice is given for the application for leave;
  - (b) for the minimum period necessary to enable the union business to be conducted or evidence to be given; and

- (c) for those officers whose attendance is essential.
- (3) The employer shall not be liable for any expenses associated with an officer attending to union business.
- (4) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.
- (5) An officer shall not be entitled to paid leave to attend to union business other than as prescribed by this Clause.
- (6) The provisions of the Clause shall not apply to:
  - (a) special arrangements made with the union which provide for unpaid leave for officers to conduct union business;
  - (b) when an officer is absent from work without the approval of the employer; and
  - (c) casual officers.

### 38. - TRADE UNION TRAINING LEAVE

- (1) Subject to departmental convenience and the provisions of this clause:
  - (a) The employer shall grant paid leave of absence to officers who are nominated by the Association to attend short courses relevant to the public sector or the role of union workplace representative, conducted by the Civil Service Association.
  - (b) The employer shall grant paid leave of absence to attend similar courses or seminars as from time to time approved by agreement between the employer and the Association.
- (2) An officer shall be granted up to a maximum of five (5) days paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five (5) days and up to ten (10) days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten (10) days.
- (3)
  - (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime.
  - (b) Where a Public Holiday or rostered day off falls during the duration of a course, a day off in lieu of that day will not be granted.
  - (c) Subject to paragraph (3)(a) of this clause, shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.
  - (d) Part-time officers shall receive the same entitlement as full time officers, but payment shall only be made for those hours that would normally have been worked but for the leave.
- (4)
  - (a) Any application by an officer shall be submitted to the employer for approval at least four weeks before the commencement of the course unless the employer agrees otherwise.
  - (b) All applications for leave shall be accompanied by a statement from the union indicating that the officer has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the authority, which is conducting the course.
- (5) A qualifying period of twelve months service shall be served before an officer is eligible to attend courses or seminars of more than a half-day duration. The employer may, where special circumstances exist, approve an application to attend a course or seminar where an officer has less than twelve months service.
- (6)
  - (a) The employer shall not be liable for any expenses associated with an officer's attendance at trade union training courses.
  - (b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

### 39. - TRAINING WITH DEFENCE FORCE RESERVES LEAVE

- (1) The employer must grant leave of absence for the purpose of defence service to an officer who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.
- (2) Leave of absence may be paid or unpaid in accordance with the provisions of this clause.
- (3) Application for leave of absence for defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the officer shall provide a certificate of attendance to the employer.
- (4) Paid leave
  - (a) An officer who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for the purpose of attending a training camp, school, class or course of instruction, subject to the conditions set out hereunder.
  - (b) Part-time officers shall receive the same paid leave entitlement as full time officers but payment shall only be made for those hours that would normally have been worked but for the leave.
  - (c) On written application, an officer shall be paid salary in advance when proceeding on such leave.
  - (d) Casual officers are not entitled to paid leave for the purpose of defence service.
- (5) Attendance at a Camp for Annual Continuous Obligatory Training
  - (a) An officer is entitled to paid leave for a period not exceeding 75 hours on full pay in any period of twelve months commencing on 1 July in each year.
  - (b) If the Officer-in-Charge of a military unit certifies that it is essential for an officer to be at the camp in an advance or rear party, a maximum of 30 extra hours leave on full pay shall be granted in the twelve-month period.

- (6) Attendance at One Special School, Class or Course of Instruction
- (a) In addition to the paid leave granted under subclause (5) of this clause, an officer is entitled to a period not exceeding 16 calendar days in any period of twelve months commencing on July 1 in each year, provided the employer is satisfied that the leave required is for a special purpose and not for a further routine camp.
- (b) In this circumstance, an officer may elect to utilise annual leave credits. However, if the leave is not taken from annual leave, salary during the period shall be at the rate of the difference between the normal remuneration of the officer as a public servant and the defence force payments to which the officer is entitled if such payments do not exceed normal salary. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and special rostered days off is to be excluded and no account is to be taken of the value of any board or lodging provided for the officer.
- (7) Unpaid leave
- (a) Any leave for the purpose of defence service that exceeds the paid entitlement prescribed in subclauses (5) and (6) of this clause shall be unpaid.
- (b) Casual officers are entitled to unpaid leave for the purpose of defence service.
- (8) Use of other leave
- (a) An officer may elect to use annual or long service leave credits for some or all of their absence on defence service, in which case they will be treated in all respects as if on normal paid leave.
- (b) An employer cannot compel an officer to use annual leave or long service leave for the purpose of defence service.

#### 40. - INTERNATIONAL SPORTING EVENTS LEAVE

- (1) Special leave with pay may be granted by the employer to an officer chosen to represent Australia as a competitor or official, at a sporting event, which meets the following criteria:
- (a) it is a recognised international amateur sport of national significance; or
- (b) it is a world or international regional competition; and
- (c) no contribution is made by the sporting organisation towards the normal salary of the officer.
- (2) The employer shall make enquiries with the Department of Sport & Recreation:
- (a) whether the application meets the above criteria;
- (b) the period of leave to be granted.

#### 41. - WITNESS AND JURY SERVICE

##### WITNESS

- (1) An officer subpoenaed or called as a witness to give evidence in any proceeding shall as soon as practicable notify the manager/supervisor who shall notify the employer.
- (2) Where an officer is subpoenaed or called as a witness to give evidence in an official capacity that officer shall be granted by the employer leave of absence with pay, but only for such period as is required to enable the officer to carry out duties related to being a witness. If the officer is on any form of paid leave, the leave involved in being a witness will be reinstated, subject to the satisfaction of the employer. The officer is not entitled to retain any witness fee but shall pay all fees received into Consolidated Revenue Fund. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the employer.
- (3) An officer subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fees or travelling expenses as soon as practicable after the default, notify the employer.
- (4) An officer subpoenaed or called, as a witness on behalf of the Crown, not in an official capacity shall be granted leave with full pay entitlements. If the officer is on any form of paid leave, this leave shall not be reinstated as such witness service is deemed to be part of the officer's civic duty. The officer is not entitled to retain any witness fees but shall pay all fees received into Consolidated Revenue Fund.
- (5) An officer subpoenaed or called as a witness under any other circumstances other than specified in subclauses (2) and (4) of this clause shall be granted leave of absence without pay except when the officer makes an application to clear accrued leave in accordance with Award provisions.

##### JURY

- (6) An officer required to serve on a jury shall as soon as practicable after being summoned to serve, notify the supervisor/manager who shall notify the employer.
- (7) An officer required to serve on a jury shall be granted by the employer leave of absence on full pay, but only for such period as is required to enable the officer to carry out duties as a juror.
- (8) An officer granted leave of absence on full pay as prescribed in subclause (6) of this clause is not entitled to retain any juror's fees but shall pay all fees received into Consolidated Revenue Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the employer.

#### 42. - CAMPING ALLOWANCE

- (1) For the purposes of this clause the following expressions shall have the following meaning:
- "Camp of a permanent nature" means single room accommodation in skid mounted or mobile type units, caravans, or barrack type accommodation where the following are provided in the camp -
- Water is freely available;
  - Ablutions including a toilet, shower or bath and, laundry facilities;
  - Hot water system;
  - A kitchen, including a stove and table and chairs, except in the case of a caravan equipped with its cooking and messing facilities;

- An electricity or power supply, and
- Beds and mattresses except in the case of caravans containing sleeping accommodation.

For the purpose of this definition caravans located in caravan parks or other locations where the above are provided shall be deemed a camp of a permanent nature.

"House" means a house; duplex or cottage including transportable type accommodation, which is self, contained and in which the facilities prescribed for "camp of a permanent nature" are provided.

"Other than a permanent camp" means a camp where any of the above is not provided.

- (2) An officer, who is stationed in a camp of a permanent nature, shall be paid the appropriate allowance prescribed by Item (1) or Item (2) of Schedule C – Camping Allowance for each day spent camping.
- (3) An officer who is stationed in a camp - other than a permanent camp - or is required to camp out, shall be paid the appropriate allowance prescribed by Item (3) or Item (4) of Schedule C. - Camping Allowance for each day spent camping.
- (4) Officers who occupy a house shall not be entitled to allowances prescribed by this Clause.
- (5) Officers accommodated at a government institution, hostel or similar establishment shall not be entitled to allowances prescribed by this clause.
- (6) Where an officer is provided with food and/or meals by the department free of charge, then the officer shall only be entitled to receive half the appropriate allowance to which the officer would otherwise be entitled for each day spent camping.
- (7)
  - (a) An officer shall not be entitled to receive an allowance under this Award for periods in excess of 91 consecutive days unless the Employer otherwise determines. Provided that where an officer is reimbursed under the provisions of Clause 54. - Travelling Allowance of this Award, then such periods shall be included for the purposes of determining the 91 consecutive days.
  - (b) The Employer in reviewing any claim under this subclause may determine an allowance other than what is contained in Schedule C - Camping Allowance.
- (8) When camping, an officer shall be paid the allowance on Saturdays and Sundays if available for work immediately preceding and succeeding such days and no deduction shall be made under these circumstances when an officer does not spend the whole or part of the weekend in camp, unless the officer is reimbursed under the provisions of Clause 54. - Travelling Allowance of this Award.
- (9) This clause shall be read in conjunction with Clauses 50. - Relieving Allowance, 53. - Transfer Allowance and 54. - Travelling Allowance of this Award for the purpose of paying allowances, and camping allowance shall not be paid for any period in respect of which travelling; transfer or relieving allowances are paid. Where portions of a day are spent camping, the formula contained in Clause 54. - Travelling Allowance of this Award shall be used for calculating the portion of the allowance to be paid for that day.  
For the purposes of this subclause arrival at headquarters shall mean the time of actual arrival at camp. Departure from headquarters shall mean the time of actual departure from camp or the time of ceasing duty in the field subsequent to breaking camp, whichever is the latter.
- (10) Officers in receipt of an allowance under this clause shall not be entitled to receive the incidental allowance prescribed by Clause 54. - Travelling Allowance of this Award.
- (11) Whenever an officer provided with a caravan is obliged to park the caravan in a caravan park he or she shall be reimbursed the rental charges paid to the authority controlling the caravan park, in addition to the payment of camping allowance.
- (12) Where an officer, who is not supplied with camping equipment by the department, hires such equipment as is reasonable and necessary, he or she shall be reimbursed such hire charges, in addition to the payment of camping allowances.

#### 43. - DISTRICT ALLOWANCE

- (1) For the purposes of this clause the following terms shall have the following meanings:  
"Dependant" in relation to an officer means:
  - (a) a spouse; or
  - (b) where there is no spouse, a child or any other relative resident within the State who rely on the officer for their main support;
 who does not receive a district or location allowance of any kind.  
"Partial dependant" in relation to an officer (for the purpose of district allowance) means:
  - (c) a spouse; or
  - (d) where there is no spouse, a child or any other relative resident within the State who rely on the officer for their main support;
 who receives a district or location allowance of any kind less than that applicable to an officer without dependants under any award, agreement or other provision regulating the employment of the partial dependant.  
"Spouse" means an officer's spouse including defacto partner.
- (2) Boundaries  
For the purpose of Schedule D. - District Allowance of this Award, the boundaries of the various districts shall be as described hereunder and as delineated on the plan in Schedule D. - District Allowance to this Award.  
District:
  - (i) The area within a line commencing on the coast; thence east along lat 28 to a point north of Tallering Peak, thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of lat 32 and long 119; thence south along long 119 to coast.

- (ii) That area within a line commencing on the south coast at long 119 then east along the coast to long 123; then north along long 123 to a point on lat 30; thence west along lat 30 to the boundary of No 1 District.
- (iii) The area within a line commencing on the coast at lat 26; thence along lat 26 to long 123; thence south along long 123 to the boundary of No 2 District.
- (iv) The area within a line commencing on the coast at lat 24; thence east to the South Australian border; thence south to the coast; thence along the coast to long 123 thence north to the intersection of lat 26; thence west along lat 26 to the coast.
- (v) That area of the State situated between the lat 24 and a line running east from Carnot Bay to the Northern Territory Border.
- (vi) That area of the State north of a line running east from Carnot Bay to the Northern Territory Border.
- (3) (a) An officer shall be paid a district allowance at the standard rate prescribed in Column II of Schedule D. - District Allowance of this Award, for the district in which the officer's headquarters is located. Provided that where the officer's headquarters is situated in a town or place specified in Column III of Schedule D.- District Allowance of this Award, the officer shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of the said schedule.
- (b) An officer who has a dependant shall be paid double the district allowance prescribed by paragraph (3)(a) of this clause for the district, town, or place in which the officer's headquarters is located.
- (c) Where an officer has a partial dependant the total district allowance payable to the officer shall be the district allowance prescribed by paragraph (3)(a) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if he or she was employed in a full time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.
- (d) When an officer is on approved annual recreational leave, the officer shall for the period of such leave, be paid the district allowance to which he or she would ordinarily be entitled.
- (e) When an officer is on long service leave or other approved leave with pay (other than annual recreational leave), the officer shall only be paid district allowance for the period of such leave if the officer, dependant/s or partial dependant/s remain in the district in which the officer's headquarters are situated.
- (f) When an officer leaves his or her district on duty, payment of any district allowance to which the officer would ordinarily be entitled shall cease after the expiration of two weeks unless the officer's dependant/s or partial dependant/s remain in the district or as otherwise approved by the Employer.
- (g) Except as provided in paragraph (3)(f) of this clause, a district allowance shall be paid to any officer ordinarily entitled thereto in addition to reimbursement of any travelling, transfer or relieving expenses or camping allowance.
- (h) Where an officer whose headquarters is located in a district in respect of which no allowance is prescribed in Schedule D. - District Allowance of this Award, is required to travel or temporarily reside for any period in excess of one month in any district or districts in respect of which such allowance is so payable, then notwithstanding the officer's entitlement to any such allowance provided by Clause 42. - Camping Allowance, Clause 50. - Relieving Allowance, Clause 52. - Sea Going Allowance and Clause 54. - Travelling Allowance of this Award the officer shall be paid for the whole of such a period a district allowance at the appropriate rate prescribed by paragraphs (3)(a), (3)(b) or (3)(c) of this clause, for the district in which the officer spends the greater period of time.
- (i) When an officer is provided with free board and lodging by the employer or a public authority the allowance shall be reduced to two-thirds of the allowance the officer would ordinarily be entitled to under this clause.

(4) Part Time Officers

An officer who is employed on a part time basis shall be paid a proportion of the appropriate district allowance payable in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{75} \times \frac{\text{Appropriate District Allowance}}{1}$$

(5) Adjustment of Rates

The rates expressed in Schedule D. - District Allowance of this Award shall be adjusted administratively every twelve (12) months, effective from the first pay period to commence on or after the first day of July in each year, in accordance with the official Consumer Price Index (CPI) for Perth, as published for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

Provided that, as agreed between the parties, the (CPI) for the March 1992 quarter shall be discounted by 1.03%.

The rates agreed, in accordance with the above formula, by the parties shall then be lodged with the Registrar of the Western Australian Industrial Relations Commission.

44. - DISTURBANCE ALLOWANCE

- (1) Where an officer is transferred and incurs expenses in the areas referred to in subclause (2) of this clause as a result of that transfer then the officer shall be granted a disturbance allowance and shall be reimbursed by the employer the actual expenditure incurred upon production of receipts or such other evidence as may be required.
- (2) The disturbance allowance shall include:
  - (a) Costs incurred for telephone installation at the officer's new residence provided that the cost of telephone installation shall be reimbursed only where a telephone was installed at the officer's former residence including employer accommodation.
  - (b) Costs incurred with the connection or reconnection of services to the officer's household including employer accommodation for water, gas or electricity.

- (c) costs incurred with the redirection of mail to the officer's new residence for a period of no more than three months.

#### 45. - DIVING ALLOWANCE

- (1) An officer who undertakes diving as part of the officer's official duties or as a special duty which is sanctioned by the Employer shall be paid an allowance as prescribed in Schedule K. - Diving, Flying and Sea Going Allowance for such diving. This allowance shall be in addition to any other payment for duties performed.

Provided that such allowance shall be paid only to an officer engaged on diving when self-contained underwater breathing apparatus or deep-sea diving equipment is used.

#### 46. - FLYING ALLOWANCE

An officer who in the course of the officer's official duties is required to fly in an aircraft other than those used in public air services, shall be paid an allowance as prescribed in Schedule K. - Diving, Flying and Sea Going Allowances of this Award for the following duties:

- (a) Observation and photographic duties, in a fixed wing aircraft.
- (b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights of less than 304 metres or in unpressurised aircraft at heights of more than 3048 metres.
- (c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance.

#### 47. - MOTOR VEHICLE ALLOWANCE

For the purposes of this clause the following expressions shall have the following meanings:

- (1)
  - (a) "A year" means 12 months commencing on the 1st day of July and ending on the 30th day of June next following.
  - (b) "Metropolitan area" means that area within a radius of 50 kilometres from the Perth City Railway Station.
  - (c) "South West land division" means the South West land division as defined by to Section 6 Schedule 1 Land Administration Act 1997 excluding the area contained within the metropolitan area.
  - (d) "Rest of the State" means that area south of 23.5 degrees south latitude, excluding the metropolitan area and the South West land division.
  - (e) "Term of Employment" means a requirement made known to the officer at the time of applying for the position by way of publication in the advertisement for the position, written advice to the officer contained in the offer for the position or oral communication at interview by an interviewing officer and such requirement is accepted by the officer either in writing or orally.
  - (f) "Qualifying Service" shall include all service in positions where there is a requirement as a term of employment to supply and maintain a motor vehicle for use on official business but shall exclude all absences, which effect entitlements as provided by the schedule attached to Administrative Instruction 610.
- (2) Allowance for Officers required to supply and maintain a vehicle as a term of employment:
  - (a) An officer who is required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment shall be reimbursed in accordance with the appropriate rates set out in Schedule E. - Motor Vehicle Allowance for journeys travelled on official business and approved by the Employer.
  - (b) An officer who is reimbursed under the provisions of paragraph (2)(a) will also be subject to the following conditions: -
    - (i) For the purposes of subclause (2) an officer shall be reimbursed with the appropriate rates set out in Schedule E. - Motor Vehicle Allowance for the distance travelled from the officer's residence to the place of duty and for the return distance travelled from place of duty to residence except on a day where the officer travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.
    - (ii) Where an officer in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Schedule E. - Motor Vehicle Allowance
    - (iii) Where an officer does not travel in excess of 4,000 kilometres in a year an allowance calculated by multiplying the appropriate rate per kilometre by the difference between the actual distance travelled and 4,000 kilometres shall be paid to the officer provided that where the officer has less than 12 months qualifying service in the year then the 4,000 kilometre distance will be reduced on a pro rata basis and the allowance calculated accordingly.
    - (iv) Where a part-time officer is eligible for the payment of an allowance under subparagraph (iii) of this subclause such allowance shall be calculated on the proportion of total hours worked in that year by the officer to the annual standard hours had the officer been employed on a full time basis for the year.
    - (v) An officer who is required to supply and maintain a motor vehicle for use on official business is excused from this obligation in the event of his/her vehicle being stolen, consumed by fire, or suffering a major and unforeseen mechanical breakdown or accident, in which case all entitlement to reimbursement ceases while the officer is unable to provide the motor vehicle or a replacement.
    - (vi) The Employer may elect to waive the requirement that an officer supply and maintain a motor vehicle for use on official business, but three months written notice of the intention so to do shall be given to the officer concerned.
- (3) Allowance for officers relieving officers subject to subclause (2) of this clause
  - (a) An officer not required to supply and maintain a motor vehicle as a term of employment who is required to relieve an officer required to supply and maintain a motor vehicle as a term of employment shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Schedule E. - Motor Vehicle Allowance for all journeys travelled on official business and approved by the Employer where the officer is required to use his/her vehicle on official business whilst carrying out the relief duties.

- (b) For the purposes of paragraph (3)(a) of this clause an officer shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Schedule E. - Motor Vehicle Allowance for the distance travelled from the officer's residence to place of duty and the return distance travelled from place of duty to residence except on a day where the officer travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.
  - (c) Where an officer in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Schedule E. - Motor Vehicle Allowance.
  - (d) For the purpose of this subclause the allowance provided in subparagraphs (2)(b)(iii) and (iv) of this clause shall not apply.
- (4) Allowance for other officers using vehicle on official business.
- (a) An officer who is not required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment, but when requested by the Employer voluntarily consents to use the vehicle shall for journeys travelled on official business approved by the Employer be reimbursed all expenses incurred in accordance with the appropriate rates set out in Schedule F. - Motor Vehicle Allowance and Schedule G. - Motor Cycle Allowance.
  - (b) For the purpose of paragraph (4)(a) of this clause an officer shall not be entitled to reimbursement for any expenses incurred in respect to the distance between the officer's residence and headquarters and the return distance from headquarters to residence.
  - (c) Where an officer in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate if applicable to each of the areas traversed as set out in Schedule F. - Motor Vehicle Allowance.
- (5) Allowance for towing Departmental caravan or trailer.  
In case where officers are required to tow departmental caravans on official business, the additional rate shall be 6.5 cents per kilometre. When departmental trailers are towed on official business the additional rate shall be 3.5 cents per kilometre.
- (6) Special Conditions.  
Notwithstanding the provisions of Clause 5. - Term of Award of this Award where the cost of vehicles and petrol increase or decrease such that a corresponding increase or decrease in the allowance provided for a vehicle over 1600cc in the metropolitan area would amount to 0.1 of a cent or greater then the parties agree that the allowance shall be increased or decreased accordingly.

#### 48. - PROPERTY ALLOWANCE

- (1) For the purposes of this clause the following expressions shall have the following meanings:
- (a) "Agent" means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.
  - (b) "Dependant" in relation to an officer means:
    - (i) spouse including defacto partner;
    - (ii) child/children; or
    - (iii) other dependant family;
 who resides with the officer and who relies on the officer for support.
  - (c) "Expenses" in relation to an officer means all costs incurred by the officer in the following areas:
    - (i) Legal fees in accordance with the Solicitor's Remuneration Order, 1976 as amended and varied, duly paid to a solicitor or in lieu thereof fees charged by a settlement agent for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out under item 8 of the above order.
    - (ii) Disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence.
    - (iii) Real Estate Agent's Commission in accordance with that fixed by the Real Estate and Business Agents Supervisory Board, acting under Section 61 of the Real Estate and Business Agents Act, 1978, duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed shall be fifty percent (50%) as set out under Items 1 or 2 - Sales by Private Treaty or Items 1 or 2 - Sales by Auction of the Maximum Remuneration Notice.
    - (iv) Stamp Duty.
    - (v) Fees paid to the Registrar of Titles or to the officer performing duties of a like nature and for the same purpose in another State or Territory of the Commonwealth.
    - (vi) Expenses relating to the execution or discharge of a first mortgage.
    - (vii) The amount of expenses reasonably incurred by the officer in advertising the residence for sale.
  - (d) "Locality" in relation to an officer means:
    - (i) Within the metropolitan area, that area within a radius of fifty (50) kilometres from the Perth City Railway Station, and
    - (ii) Outside the metropolitan area, that area within a radius of fifty (50) kilometres from an officer's headquarters when they are situated outside of the metropolitan area.

- (e) "Property" shall mean a residence as defined in this clause including a block of land purchased for the purpose of erecting a residence thereon to the extent that it represents a normal urban block of land for the particular locality.
  - (f) "Residence" includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement including dwelling house, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular locality.
  - (g) "Settlement Agent" means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under the law.
- (2) When an officer is transferred from one locality to another in the public interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the officer has no control, the officer shall be entitled to be paid a property allowance for reimbursement of expenses incurred by the officer -
- (a) In the sale of residence in the officer's former locality, which, at the date on which the officer received notice of transfer to a new locality: -
    - (i) the officer owned and occupied; or
    - (ii) the officer was purchasing under a contract of sale providing for vacant possession; or
    - (iii) the officer was constructing for the officer's own permanent occupation, on completion of construction; and
  - (b) In the purchase of a residence or land for the purpose of erecting a residence thereon for the officer's own permanent occupation in the new locality.
- (3) An officer shall be reimbursed such following expenses as are incurred in relation to the sale of a residence:
- (a) If the officer engaged an agent to sell the residence on the officer's behalf - 50 percent of the amount of the commission paid to the agent in respect of the sale of the residence;
  - (b) if a solicitor was engaged to act for the officer in connection with the sale of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the residence;
  - (c) if the land on which the residence is created was subject to a first mortgage and that mortgage was discharged on the sale, then an officer shall, if, in a case where a solicitor acted for the mortgagee in respect of the discharge of the mortgage and the officer is required to pay the amount of professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage - the amount so paid by the officer;
  - (d) if the officer did not engage an agent to sell the residence on his or her behalf - the amount of the expenses reasonably incurred by the officer in advertising the residence for sale.
- (4) An officer shall be reimbursed such following expenses as are incurred in relation to the purchase of a residence:
- (a) if a solicitor or settlement agent was engaged to act for the officer in connection with the purchase of the residence - the amount of the professional costs and disbursements necessarily incurred are paid to the solicitor or settlement agent in respect of the purchase of the residence;
  - (b) if the officer mortgaged the land on which the residence was erected in conjunction with the purchase of the residence, then an officer shall, if, in a case where a solicitor acted for the mortgagee and the officer is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuration fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage - the amount so paid by the officer;
  - (c) if the officer did not engage a solicitor or settlement agent to act for the officer in connection with the purchase or such a mortgage - the amount of the expenses reasonably incurred by the officer in connection with the purchase or the mortgage, as the case may be, other than a procuration fee paid by the officer in connection with the mortgage.
- (5) An officer is not entitled to be paid a property allowance under paragraph (2)(b) of this clause unless the officer is entitled to be paid a property allowance under paragraph (2)(a) of this clause, provided that the Employer may approve the payment of a property allowance under paragraph (2)(b) of this clause to an officer who is not entitled to be paid a property allowance under paragraph (2)(a) of this clause if the Employer is satisfied that it was necessary for the officer to purchase a residence or land for the purpose of erecting a residence thereon in the officer's new locality because of the officer's transfer from the former locality.
- (6) For the purpose of this Award it is immaterial that the ownership, sale or purchase is carried out on behalf of an officer who owns solely, jointly or in common with:-
- (a) the officer's spouse, or
  - (b) a dependant relative, or
  - (c) the officer's spouse and a dependant relative.
- (7) Where an officer sells or purchases a residence jointly or in common with another person - not being a person referred to in subclause (6) of this clause the officer shall be paid only the proportion of the expenses for which the officer is responsible.
- (8) An application by an officer for a property allowance shall be accompanied by evidence of the payment by the officer of the expenses, being evidence that is satisfactory to the Employer.
- (9) Notwithstanding the foregoing provisions, an officer is not entitled to the payment of a property allowance -
- (a) In respect of a sale or purchase prescribed in subclause (2) of this clause which is effected -
    - (i) more than twelve months after the date on which the officer took up duty in the new locality; or
    - (ii) after the date on which the office received notification of being transferred back to the former locality;

Provided that the Employer may, in exceptional circumstances, grant an extension of time for such period as is deemed reasonable.

- (b) Where the officer is transferred from one locality to another solely at the officer's own request or on account of misconduct.

#### 49. - PROTECTIVE CLOTHING ALLOWANCE

An officer engaged on work, which requires the provision of protective clothing, shall be:

- (a) Provided with the requisite protective clothing, with the laundering costs for such protective clothing being at the expense of the employer; or
- (b) Provided with an annual allowance, as agreed between the Association and the Employer, which shall incorporate the cost of purchase and laundry of the requisite protective clothing.

Provided that nothing contained in this clause shall affect the obligations of the employer to provide clothing pursuant to the *Occupational Health and Safety Act, 1984*.

#### 50. - RELIEVING ALLOWANCE

An officer who is required to take up duty away from headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the officer's usual place of residence shall be reimbursed reasonable expenses on the following basis:-

- (1) Where the officer:-  
is supplied with accommodation and meals free of charge, or  
is accommodated at a government institution, hostel or similar establishment and supplied with meals,  
reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule I. - Travelling, Transfer and Relieving Allowance.
- (2) Where officers are fully responsible for their own accommodation, meals and incidental expenses and hotel or motel accommodation is utilised:-
- (a) For the first forty-two (42) days after arrival at the new locality reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule I. - Travelling, Transfer and Relieving Allowance.
- (b) For periods in excess of forty-two (42) days after arrival in the new locality reimbursement shall be in accordance with the rates prescribed in Column B, Items (4) to (8) of Schedule I. - Travelling, Transfer and Relieving Allowance for officers with dependants or Column C, Items (4) to (8) of Schedule I. - Travelling, Transfer and Relieving Allowance for other officers: Provided that the period of reimbursement under this subclause shall not exceed forty-nine (49) days without the approval of the Employer.
- (3) Where officers are fully responsible for their own accommodation, meal and incidental expenses and other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule I. - Travelling, Transfer and Relieving Allowance.
- (4) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of \$144.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of \$144.00 in any one period of three (3) years.
- (5) Reimbursement of expenses shall not be suspended should an officer become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with the provisions of this Award and the officer continues to incur accommodation, meal and incidental expenses.
- (6) When an officer who is required to relieve or perform special duties in accordance with the preamble of this clause is authorised by the Employer to travel to the new locality in the officer's own motor vehicle, reimbursement for the return journey shall be as follows:-
- (a) Where the officer will be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement shall be in accordance with the appropriate rate prescribed by subclause (2) of Clause 47. - Motor Vehicle Allowance of this award.
- (b) Where the officer will not be required to maintain a motor vehicle for the performance of the relieving or special duties reimbursement shall be on the basis of one half (½) of the appropriate rate prescribed by subclause (2) of Clause 47. - Motor Vehicle Allowance of this award. Provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.
- (7) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement shall be determined by the Employer.
- (8) The provisions of Clause 54. - Travelling Allowance shall not operate concurrently with the provisions of this clause to permit an officer to be paid allowances in respect of both travelling and relieving expenses for the same period: Provided that where an officer is required to travel on official business which involves an overnight stay away from the officer's temporary headquarters the Employer may extend the periods specified in subclause (2) of this clause by the time spent in travelling.
- (9) An officer who is directed to relieve another officer or to perform special duty away from the officer's usual headquarters and is not required to reside temporarily away from his or her usual place of residence shall, if the officer is not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid by the officer travelling by public transport to and from the place of temporary duty.

#### 51. - REMOVAL ALLOWANCE

- (1) When an officer is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the officer has no control, the officer shall be reimbursed:-
- (a) The actual reasonable cost of conveyance of the officer and dependants.

- (b) The actual cost (including insurance) of the conveyance of an officer's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the Employer in special cases.
- (c) An allowance of \$520.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an officer is required to transport his or her furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the officer is at least \$3,114.00.
- (d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of \$156.00.  
 Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the officer's dependents for the purpose of household enjoyment.  
 Pets do not include domesticated livestock, native animals or equine animals.
- (2) An officer who is transferred solely at his or her own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the Employer prior to removal.
- (3) An officer shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the officer's motor vehicle. If authorised by the Employer to travel to a new locality in the officer's own motor vehicle, reimbursement shall be as follows: -
  - (a) Where the officer will be required to maintain a motor vehicle for use on official business at the new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause (2) of Clause 47. - Motor Vehicle Allowance of this Award.
  - (b) Where the officer will not be required to maintain a motor vehicle for use on official business at the new headquarters reimbursement for the distance necessarily travelled shall be on the basis of one half (½) of the appropriate rate prescribed by subclause (3) of Clause 47. - Motor Vehicle Allowance of this Award.
- (4) The officer shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the Employer, who may authorise the acceptance of the more suitable: Provided that payment for a volume amount beyond 35 cubic metres by a department is not to occur without the prior written approval of the Employer.
- (5) The Employer may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an officer, with prior approval of the Employer, disposes of his or her household furniture effects and appliances instead of removing them to the new headquarters: Provided that such payments shall not exceed the sum which would have been paid if the officer's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 35 cubic metres.
- (6) Where an officer is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the officer is obliged to store furniture, the officer shall be reimbursed the actual cost of such storage up to a maximum allowance of \$966.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.
- (7) Receipts must be produced for all sums claimed.
- (8) New appointees to the public service shall be entitled to receive the benefits of this clause if they are required by the employer to participate in any training course prior to being posted to their respective positions in the service. This entitlement shall only be available to officers who have completed their training and who incur costs when moving to their first posting.

#### 52. - SEA GOING ALLOWANCE

- (1) Victualling Allowance - Government Vessels.
  - (a) An officer who is required to live on board a vessel and is necessarily absent from his or her usual place of residence overnight, shall be paid a victualling allowance as prescribed in Schedule K. - Diving, Flying and Sea Going Allowance to cover victualling and all incidents of employment other than overtime.
  - (b) The daily allowance shall be paid for each day exceeding eight hours spent on board a vessel, provided that one half of the allowance shall be paid for any part of a day not exceeding eight hours.
- (2) Victualling Allowance - Non-Government Vessels.
  - (a) Charges for victualling levied on an officer when accommodated on other than a government vessel shall be met by the employer and the victualling allowance referred to in subclause (1) of this clause shall not be payable.
  - (b) Subject to the decision of the Employer that the difficulties of living on board the non government vessel are greater than those normally encountered on a government vessel, an allowance as prescribed in Schedule K. - Diving, Flying and Sea Going Allowance for each occasion on which the officer is accommodated overnight, shall be paid.
- (3) Hard Living Allowance - All Vessels.  
 To compensate for difficulties associated with living in small vessels at sea an allowance as prescribed in Schedule K. - Diving, Flying and Sea Going Allowance shall be paid to officers for every hour spent at sea in excess of 36 consecutive hours on a single trip.
- (4) An officer in receipt of an allowance prescribed by this clause shall not receive payment of allowances prescribed in Clause 50. - Relieving Allowance or Clause 54. - Travelling Allowance of this Award.

#### 53. - TRANSFER ALLOWANCE

- (1) Subject to subclauses (2) and (5) of this clause an officer who is transferred to a new locality in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the officer has no control, shall be paid at the rates prescribed in Column A, Item (4), (5) or (6) of Schedule I. - Travelling, Transfer and Relieving Allowance for a period of 14 days after arrival at new headquarters within Western Australia or Column A, Items (7) and (8) of Schedule I. - Travelling, Transfer and Relieving Allowance for a period of 21 days after arrival at a new headquarters in another State of Australia: Provided that if an officer is required to travel on official business during the

said periods, such period will be extended by the time spent in travelling. Under no circumstances, however, shall the provisions of this subclause operate concurrently with those of Clause 54. - Travelling Allowance of this award to permit an officer to be paid allowances in respect of both travelling and transfer expenses for the same period.

- (2) Prior to the payment of an allowance specified in subclause (1) of this clause, the Employer shall:
- (a) Require the officer to certify that permanent accommodation has not been arranged or is not available from the date of transfer. In the event that permanent accommodation is to be immediately available, no allowance is payable; and
  - (b) Require the officer to advise the employer that should permanent accommodation be arranged or become available within the prescribed allowance periods, the officer shall refund the pro rata amount of the allowance for that period the occupancy in permanent accommodation takes place prior to the completion of the prescribed allowance periods.
- Provided also that should an occupancy date which falls within the specified allowance periods be notified to the Department prior to the officer's transfer, the payment of a pro rata amount of the allowance should be made in lieu of the full amount.
- (3) If an officer is unable to obtain reasonable accommodation for the transfer of his or her home within the prescribed period referred to in subclause (1) of this clause and the Employer is satisfied that the officer has taken all possible steps to secure reasonable accommodation, such officer shall, after the expiration of the prescribed period to be paid in accordance with the rates prescribed by Column B, Items (4), (5), (6), (7) or (8) of Schedule I. - Travelling, Transfer and Relieving Allowance as the case may require, until such time as the officer has secured reasonable accommodation: Provided that the period of reimbursement under this subclause shall not exceed 77 days without the approval of the Employer.
- (4) When it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an officer on transfer, an appropriate rate of reimbursement shall be determined by the Employer.
- (5) An officer who is transferred to employer accommodation shall not be entitled to reimbursement under this clause: Provided that:-
- (a) where entry into employer accommodation is delayed through circumstances beyond the officer's control an officer may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the officer and dependants less a deduction for normal living expenses prescribed in Column A, Items (15) and (16) of Schedule I. - Travelling, Transfer and Relieving Allowance.  
and provided that -
  - (b) if any costs are incurred under subclause (2) of Clause 44. - Disturbance Allowance of this Award they shall be reimbursed by the employer.

#### 54. - TRAVELLING ALLOWANCE

An officer who travels on official business shall be reimbursed reasonable expenses on the following basis:-

- (1) When a trip necessitates an overnight stay away from headquarters and the officer:-
- (a) is supplied with accommodation and meals free of charge; or
  - (b) attends a course, conference, etc., where the fee paid includes accommodation and meals; or
  - (c) travels by rail and is provided with a sleeping berth and meals; or
  - (d) is accommodated at a Government institution, hostel or similar establishment and supplied with meals;
  - (e) reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule I. - Travelling, Transfer and Relieving Allowance.
- (2) When a trip necessitates an overnight stay away from headquarters and the officer is fully responsible for his or her own accommodation, meals and incidental expenses:-
- (a) where hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule I. - Travelling, Transfer and Relieving Allowance; and
  - (b) where other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule I. - Travelling, Transfer and Relieving Allowance.
- (3) When a trip necessitates an overnight stay away from headquarters and accommodation only is provided at no charge to the officer, reimbursement shall be made in accordance with the rates prescribed in Column A, Items 1, 2 or 3 and Items 12, 13 or 14 of Schedule I. - Travelling, Transfer and Relieving Allowance subject to the officers' certification that each meal claimed was actually purchased.
- (4) To calculate reimbursement under subclauses (1) and (2) of this clause for a part of a day, the following formula shall apply:-
- (a) If departure from headquarters is:
    - before 8.00am - 100% of the daily rate.
    - 8.00am or later but prior to 1.00pm - 90% of the daily rate.
    - 1.00pm or later but prior to 6.00pm - 75% of the daily rate.
    - 6.00pm or later - 50% of the daily rate.
  - (b) If arrival back at headquarters is:
    - 8.00am or later but prior to 1.00pm - 10% of the daily rate.
    - 1.00pm or later but prior to 6.00pm - 25% of the daily rate.
    - 6.00pm or later but prior to 11.00pm - 50% of the daily rate.
    - 11.00pm or later - 100% of the daily rate.

- (5) When an officer travels to a place outside a radius of fifty (50) kilometres measured from the officer's headquarters, and the trip does not involve an overnight stay away from headquarters, reimbursement for all meals claimed shall be at the rates set out in Column A, Items (12) or (13) of Schedule I. - Travelling, Transfer and Relieving Allowance subject to the officer's certification that each meal claimed was actually purchased: Provided that when an officer departs from headquarters before 8.00am and does not arrive back at headquarters until after 11.00pm on the same day the officer shall be paid at the appropriate rate prescribed in Column A, Items (4) to (8) of Schedule I. - Travelling, Transfer and Relieving Allowance.
- (6) When it can be shown to the satisfaction of the Employer by the production of receipts that reimbursement in accordance with Schedule I. - Travelling, Transfer and Relieving Allowance does not cover an officer's reasonable expenses for a whole trip the officer shall be reimbursed the excess expenditure.
- (7) In addition to the rates contained in Schedule I. - Travelling, Transfer and Relieving Allowance an officer shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.
- (8) If on account of lack of suitable transport facilities an officer necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the officer shall be reimbursed the actual cost of such accommodation.
- (9) Reimbursement of expenses shall not be suspended should an officer become ill whilst travelling, provided leave for the period of such illness is approved in accordance with provisions of Clause 26. - Sick Leave of this award, and the officer continues to incur accommodation, meal and incidental expenses.
- (10) Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying officer unless the Employer has endorsed the account.
- (11) An officer who is relieving at or temporarily transferred to any place within a radius of fifty (50) kilometres measured from the officer's headquarters shall not be reimbursed the cost of midday meals purchased, but an officer travelling on duty within that area which requires absence from the officer's headquarters over the usual midday meal period shall be paid at the rate prescribed by Item 17 of Schedule I. - Travelling, Transfer and Relieving Allowance for each meal necessarily purchased, provided that:-
  - (a) such travelling is not a normal feature in the performance of the officer's duties; and
  - (b) such travelling is not within the suburb in which the officer resides; and
  - (c) the officer's total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item (18) of Schedule I. - Travelling, Transfer and Relieving Allowance.

#### 55. - WEEKEND ABSENCE FROM RESIDENCE

- (1) An officer who is temporarily absent from his or her normal headquarters on relieving duty or travelling on official business outside a radius of three hundred and twenty (320) kilometres measured from the normal headquarters and is necessarily absent from his or her residence and separated from dependants, shall be granted an additional day's leave for every group of three (3) consecutive weekends so absent, provided that each weekend shall be counted as a member of only one group. Provided that:
  - (a) the relief duty or travelling on official business is within Australia and the officer is not directed to work on the weekend by the employer;
  - (b) an additional day's leave shall not be allowed if the employer has approved the officer's dependants accompanying the officer during the period of relief or travelling;
  - (c) additional leave under this subclause shall be commenced within one (1) month of the period of relief duty or travelling being completed unless the employer approves otherwise;
  - (d) the annual leave loading provided by Clause 23. - Annual Leave of this Award shall not apply to any leave entitlements under this clause.
- (2) Officers who are temporarily absent from their normal headquarters on relieving duty or travelling on official business outside a radius of three hundred and twenty (320) and up to four hundred (400) kilometres measured from the normal headquarters, may elect to have the benefit of concessions provided by subclause (3) of this clause in lieu of those provided by subclause (1) of this clause. Kalgoorlie, Albany and Geraldton shall be regarded as being within a radius of four hundred (400) kilometres for the purpose of this subclause in the case of an officer resident in the Metropolitan Area.
- (3) Officers who are temporarily absent from their normal headquarters on relieving duty or travelling on official business within a radius of three hundred and twenty (320) kilometres measured from the officer's headquarters, and such relief duty or travel would normally necessitate the officer being absent from his or her residence for a weekend, shall be allowed to return to such residence for the weekend. Provided that:
  - (a) An officer who is directed to work on a weekend by the employer shall not be entitled to the concessions;
  - (b) All travelling to and from the officer's residence shall be undertaken outside of the hours of duty prescribed by Clause 20. - Hours.
  - (c) An officer who has obtained the approval of the employer for dependants to accompany the officer during the period of relief or travelling shall not be entitled to the concessions provided by this subclause;
  - (d) When an officer is authorised by the employer to use his or her own motor vehicle to travel to the locality where the relief duty is being performed or when travelling on official business the officer shall be reimbursed on the basis of one half ( $\frac{1}{2}$ ) of the appropriate rate prescribed by subclause (3) of Clause 47. - Motor Vehicle Allowance of this Award for the journey to the officer's residence for the weekend and the return to the place of relief duty: Provided that the maximum amount of reimbursement shall not exceed the cost of the rail or bus fare by public conveyance which otherwise would be utilised for such journey and payment shall be made only to the owner of such vehicle;
  - (e) When an officer has been authorised by the employer to use a government motor vehicle in connection with the relief duty or travelling on official business, the officer shall be allowed to use that vehicle for the purpose of returning to his or her residence for the weekend;

- (f) An officer who does not use his or her own vehicle or a government motor vehicle as provided by paragraphs (d) and (e) of this subclause, shall be reimbursed the cost of the fare by public conveyance by road or rail for the journey to and from the officer's residence for the weekend;
- (g) An officer who does not make use of the provision of this subclause shall be paid travelling allowance or relieving allowance as the case may require in accordance with the provisions of Clause 50. - Relieving Allowance or Clause 54. - Travelling Allowance of this Award.
- (h) Officers who return to their residence for the weekend in accordance with the provisions of this subclause shall not be entitled to the reimbursement of any expenses allowed by Clause 50. - Relieving Allowance and Clause 54. - Travelling Allowance of this Award during the period from the time when the officer returns to his or her residence to the time of departing from such residence to travel to resume duty at the place away from the residence.

#### 56. - PRESERVATION OF RIGHTS

As a result of this Order, nothing herein contained shall in itself operate so as to detrimentally alter the conditions of employment or salary that is the minimum prescribed in this Award or any benefit superior to any contained herein.

#### 57. - KEEPING OF AND ACCESS TO EMPLOYMENT RECORDS

Employers must ensure that the keeping of employment records and access to employment records of officers is in accordance with *Industrial Relations Act 1979 Part 11 Division 2F Keeping of and access to employment records*.

If the employer maintains a personal or other file on an employee subject to the employer's convenience, the employee shall be entitled to examine all material maintained on that file.

#### 58. - NOTIFICATION OF CHANGE

- (1) (a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on officers, the employer shall notify the officers who may be affected by the proposed changes and the Association.
- (b) For the purpose of this clause "significant effects" include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of officers to other work or locations and restructuring of jobs.  
Provided that where this Award or any other Award or Agreement makes provision for alteration of any of the matters referred to in this clause an alteration shall be deemed not to have significant effect.
- (2) (a) The employer shall discuss with the officers affected and the Association, amongst other things, the introduction of the changes referred to in subclause (1) of this clause, the effects the changes are likely to have on officers, measures to avert or mitigate the adverse effects of such changes on officers and shall give prompt consideration to matters raised by the officers and/or the Association in relation to the changes.
- (b) The discussion shall commence as early as practicable after a firm decision has been made by the employer to make the changes referred to in subclause (1) of this clause, unless by prior arrangement, the Association is represented on the body formulating recommendations for change to be considered by the employer.
- (c) For the purposes of such discussion an employer shall provide to the officers concerned and the Association all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on officers and any other matters likely to affect officers. Provided that any employer shall not be required to disclose confidential information, the disclosure of which would be inimical to the employer's interests.

#### 59. - RIGHT OF ENTRY AND INSPECTION BY AUTHORISED REPRESENTATIVES

The parties shall act consistently with the terms of the *Division 2 G - Right of Entry and Inspection by Authorised Representatives - of the Industrial Relations Act 1979*.

An authorised representative shall on notification to the employer have the right to enter the employer's premises during working hours, including meal breaks, for the purpose of discussing with relevant employees who wish to participate in those discussions the legitimate business of the Association or for the purpose of investigating complaints concerning the application of this Award, but shall in no way unduly interfere with the work of officers.

#### 60. - COPIES OF AWARD

Every officer shall be entitled to have access to a copy of this Award. Sufficient copies shall be made available, either hard copy or by modern electronic means by the employer for this purpose. Where a hard copy is requested it shall be made available.

#### 61. - ESTABLISHMENT OF CONSULTATIVE MECHANISMS

The parties to this Award or agreement are required to establish a consultative mechanism/s and procedures appropriate to their size, structure and needs, for consultation and negotiation on matters affecting the efficiency and productivity of the Public Sector.

#### 62. - SPECIAL CONDITIONS

Nothing in this Award shall be construed so as to take away from the Association the right to make a claim in respect of a specific occupational group covered by this Award.

#### 63. - TRANSITION

For the purposes of this clause "this agreement" shall mean the Public Services Salaries Agreement 1985.

- (1) Qualification Allowance:
  - (a) Officers in receipt of a qualifications allowance at the date of operation of this Agreement or who would have become entitled to such allowance, or increase in such allowance, pursuant to the provisions contained in Clause 13 of the Public Service Administrative and Clerical Divisions Salaries Award 1982, No. 1 of 1982, as a result of studies completed in the 1985 calendar year, shall continue to receive or be granted such allowance, or increase in allowance provided that such allowance shall be reduced or ceased in accordance with the following:

	Annual Allowance Diplomates \$	Annual Allowance Graduates and Associates \$
Up to and including Level 3, min	200	300
Level 3, 2nd and 3rd increments	100	200
Level 3 max	Nil	100
Level 4 and above	Nil	Nil

- (b) Officers who are not entitled to a qualification allowance pursuant to subparagraph (i) of this Subclause or who attain a higher qualification subsequently shall not be entitled to receive an allowance or increase in the allowance.

#### 64. – Dispute Settlement Procedure

- (1) Any questions, difficulties or disputes arising under this Award of officers bound by the award shall be dealt with in accordance with this clause.
- (2) The officer/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three (3) working days.
- (3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's superior and an attempt made to find a satisfactory solution, within a further three (3) working days.
- (4) If the dispute is still not resolved, it may be referred by the officer/s or Association representative to the employer or his/her nominee.
- (5) Where the dispute cannot be resolved within five (5) working days of the Association representatives' referral of the dispute to the employer or his/her nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.
- (6) The period for resolving a dispute may be extended by agreement between the parties.
- (7) At all stages of the procedure the officer may be accompanied by an Association representative.

#### SCHEDULE A. - SALARIES

- (1) Annual salaries applicable to officers covered by this Award:

Level	Salary Per Annum \$	Arbitrated Safety Net Adjustments \$	Total Salary Per Annum \$
Level 1			
Under 17 years	11355	2385	13740
17 years	13270	2788	16058
18 years	15480	3251	18731
19 years	17918	3764	21682
20 years	20122	4227	24349
1.1	22104	4643	26747
1.2	22756	4643	27399
1.3	23407	4643	28050
1.4	24054	4748	28802
1.5	24705	4748	29453
1.6	25356	4748	30104
1.7	26105	4644	30749
1.8	26623	4644	31267
1.9	27389	4644	32033
Level 2			
2.1	28306	4644	32950
2.2	29009	4644	33653
2.3	29748	4644	34392
2.4	30529	4644	35173
2.5	31346	4644	35990
Level 3			
3.1	32469	4644	37113
3.2	33344	4644	37988
3.3	34246	4644	38890
3.4	35172	4539	39711
Level 4			
4.1	36442	4539	40981
4.2	37437	4435	41872
4.3	38461	4435	42896
Level 5			
5.1	40433	4435	44868
5.2	41766	4435	46201
5.3	43151	4435	47586
5.4	44588	4435	49023

Level	Salary Per Annum \$	Arbitrated Safety Net Adjustments \$	Total Salary Per Annum \$
Level 6			
6.1	46899	4435	51334
6.2	48470	4435	52905
6.3	50096	4435	54531
6.4	51832	4435	56267
Level 7			
7.1	54494	4435	58929
7.2	56336	4435	60771
7.3	58340	4435	62775
Level 8			
8.1	61597	4435	66032
8.2	63930	4435	68365
8.3	66823	4435	71258
Level 9			
9.1	70436	4435	74871
9.2	72877	4435	77312
9.3	75661	4435	80096
Class 1	79871	4435	84306
Class 2	84081	4435	88516
Class 3	88289	4435	92724
Class 4	92499	4435	96934

- (2) Salary increases resulting from State Wage Case Decisions are calculated for those officers under the age of 21 years employed at Level 1 by dividing the current junior annual salary by the current Level 1.1 annual salary and multiplying the result by the new Level 1.1 annual salary which includes the State Wage Case increase. The following formula is to be applied:

$$\frac{\text{Current junior rate}}{\text{Current Level 1.1 rate}} \times \text{New Level 1.1 rate} = \text{New junior rate}$$

#### SCHEDULE B. – SALARIES – SPECIFIED CALLINGS

- (1) Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Community Corrections Officer, Dental Officer, Dietitian, Educational Officer, Engineer, Geologist, Laboratory Technologist, Land Surveyor, Legal Officer, Librarian, Medical Officer, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, shall be entitled to annual salaries as follows:

Level	Salary Per Annum \$	Arbitrated Safety Net \$	Total Salary Per Annum \$
Level 2/4			
1st year	28306	4644	32950
2nd year	29748	4644	34392
3rd year	31346	4644	35990
4th year	33344	4644	37988
5th year	36442	4539	40981
6th year	38461	4435	42896
Level 5			
1st year	40433	4435	44868
2nd year	41766	4435	46201
3rd year	43151	4435	47586
4th year	44588	4435	49023
Level 6			
1st year	46899	4435	51334
2nd year	48470	4435	52905
3rd year	50096	4435	54531
4th year	51832	4435	56267
Level 7			
1st year	54494	4435	58929
2nd year	56336	4435	60771
3rd year	58340	4435	62775
Level 8			
1st year	61597	4435	66032
2nd year	63930	4435	68365

Level	Salary Per Annum	Arbitrated Safety Net \$	Total Salary Per Annum \$
3rd year Level 9	66823	4435	71258
1st year	70436	4435	74871
2nd year	72877	4435	77312
3rd year	75661	4435	80096
Class 1	79871	4435	84306
Class 2	84081	4435	88516
Class 3	88289	4435	92724
Class 4	92499	4435	96934

SCHEDULE C - CAMPING ALLOWANCE

## South of 26 o South Latitude

ITEM		RATE PER DAY
1	Permanent Camp Cook provided by the Employer	31.45
2	Permanent Camp No cook provided by the Employer	41.95
3	Other Camping Cook provided by the Employer	52.45
4	Other Camping No cook provided	62.90

## North of 26 o South Latitude

ITEM		RATE PER DAY
1	Permanent Camp Cook provided by the Employer	37.55
2	Permanent Camp No cook provided by the Employer	48.00
3	Other Camping Cook provided by the Employer	58.50
4	Other Camping No cook provided	69.00

SCHEDULE D - DISTRICT ALLOWANCE

## (a) Officers without dependants (subclause 43(3)(a)):

COLUMN I DISTRICT NO.	COLUMN II STANDARD RATE \$ p.a.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV RATE \$ p.a.
6	3,396	Nil	Nil
5	2,779	Fitzroy Crossing Halls Creek Turner River Camp Nullagine Liveringa (Camballin) Marble Bar Wittenoom Karratha Port Hedland	3,742
4	1,400	Warburton Mission Carnarvon	3,761
3	882	Meekatharra Mount Magnet Wiluna Laverton Leonora Cue	1,318
2	633	Kalgoorlie Boulder Ravensthorpe Norseman Salmon Gums Marvel Loch Esperance	212
1	Nil	Nil	836
			Nil

## (b) Officers with dependants (paragraph 43(3)(b))

Double the appropriate rate as prescribed in (a) above for officers without dependants.

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after July 1, 2003.

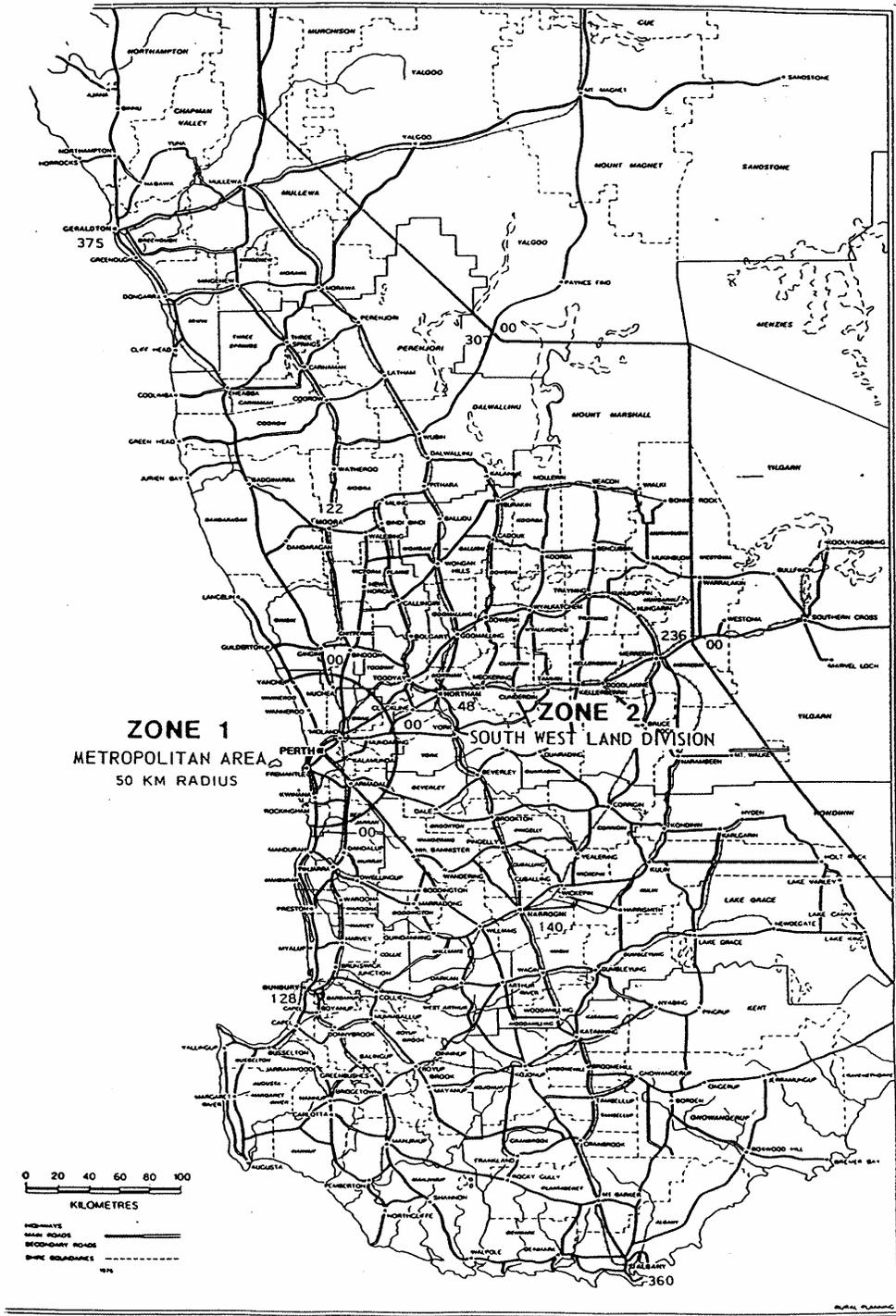


SCHEDULE E - MOTOR VEHICLE ALLOWANCE

AS FROM 18 SEPTEMBER 2003

Area Details	Rate (cents) per kilometre		
	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
<b>Metropolitan Area</b>			
First 4000 kilometres	149.7	126.6	102.2
Over 4000 up to 8000 kms	61.7	52.7	44.0
Over 8000 up to 16000 kms	32.4	28.1	24.6
Over 16000 kms	34.0	28.8	24.7
<b>South West Land Division</b>			
First 4000 kilometres	154.3	130.9	106.4
Over 4000 up to 8000 kms	64.0	54.8	46.0
Over 8000 up to 16000 kms	33.9	29.4	25.8
Over 16000 kms	35.2	29.7	25.5
<b>North of 23.5o South Latitude</b>			
First 4000 kilometres	170.9	145.4	118.9
Over 4000 up to 8000 kms	70.3	60.2	50.7
Over 8000 up to 16000 kms	36.7	31.9	28.0
Over 16000 kilometres	36.3	30.6	26.3
<b>Rest of State</b>			
First 4000 kilometres	159.2	134.8	109.2
Over 4000 up to 8000 kms	66.0	56.4	47.2
Over 8000 up to 16000 kms	34.9	30.2	26.5
Over 16000 kilometres	35.7	30.1	25.9





SCHEDULE F - MOTOR VEHICLE ALLOWANCE

AS FROM JULY 1 1997

Area Details	Rate (cents) per kilometre		
	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Metropolitan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5o South Latitude	78.7	67.3	56.4
Rest of the State	73.7	62.9	52.4

SCHEDULE G - MOTOR CYCLE ALLOWANCE

AS FROM JULY 1 1997

Distance travelled during a year on Official Business	Rate
	Cents per Kilometre
Rate per kilometre	23.9

SCHEDULE H. - OVERTIME

## PART I - OUT OF HOURS CONTACT

(Operative from the first pay period commencing on or after 4th March 2004)

Standby	\$6.32 per hour
On Call	\$3.16 per hour
Availability	\$1.58 per hour

## PART II - MEALS

(Operative from the first pay period commencing on or from 18<sup>th</sup> September 2003)

Breakfast	\$7.90 per meal
Lunch	\$9.75 per meal
Evening Meal	\$11.70 per meal
Supper	\$7.90 per meal

SCHEDULE I - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))

## ALLOWANCE TO MEET INCIDENTAL EXPENSES

		\$	\$	\$
(1)	WA - South of 26o South Latitude	10.75		
(2)	WA - North of 26o South Latitude	13.65		
(3)	Interstate	13.65		

## ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL

		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26o South Latitude	154.25	77.15	51.40
(6)	Locality North of 26o South Latitude			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05

ITEM	PARTICULARS	COLUMN A	COLUMN B	COLUMN C
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))
		\$	\$	\$
(6)	Locality North of 26o— <i>continued</i>			
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26o South Latitude	73.10		
(10)	WA - North of 26o South Latitude	85.25		
(11)	Interstate	85.25		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26o South Latitude:			
	Breakfast	13.30		
	Lunch	13.30		
	Dinner	35.80		
(13)	WA - North of 26o South Latitude			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))
		\$	\$	\$
(14)	Interstate			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
	DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 53 (5)(a))			
(15)	Each Adult	21.40		
(16)	Each Child	3.65		
	MIDDAY MEAL (CLAUSE 54(11))			
(17)	Rate per meal	5.20		
(18)	Maximum reimbursement per pay period	26.00		

#### SCHEDULE J - SHIFT WORK ALLOWANCE

A shift work allowance of \$14.74 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

The shift work allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 officer.

#### SCHEDULE K - DIVING, FLYING AND SEA GOING ALLOWANCES

- (1) Diving - (Clause 45)  
\$5.14 per hour or part thereof.
- (2) Flying - (Clause 46)
  - (a) Observation and photographic duties in fixed wing aircraft - \$9.49 per hour or part thereof.
  - (b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - \$13.01 per hour or part thereof.
  - (c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - \$17.98 per hour or part thereof.
- (3) Sea Going Allowances (Clause 52)
  - (a) Victualling
    - (i) Government Vessel - meals on board not prepared by cook - \$24.20 per day.
    - (ii) Government Vessel - meals on board are prepared by a cook - \$18.21 per day.
    - (iii) Non Government Vessel - \$22.09 each overnight period.
  - (b) Hard Living Allowance - 50 cents per hour or part thereof.

#### SCHEDULE L - NAMED PARTIES

The Civil Service Association of Western Australia Incorporated

The employing authority, as defined by the Public Sector Management Act 1994, of each of the following public authorities:

Department of Indigenous Affairs  
 Department of Agriculture Western Australia  
 Office of the Auditor General  
 Department of Conservation and Land Management  
 Disability Services Commission  
 Department of Education and Training  
 Western Australian Electoral Commission  
 Department of Environment  
 Equal Opportunity Commission  
 Department for Community Development  
 Department of Fisheries  
 Gascoyne Development Commission  
 Government Employees Superannuation Board  
 Goldfields-Esperance Development Commission  
 Great Southern Development Commission  
 Department of Health  
 Office of Health Review

Department of Housing and Works  
 Western Australian Industrial Relations Commission  
 Office of the Information Commissioner  
 Department of Justice  
 Kimberley Development Commission  
 Department of Land Information  
 Department of Local Government and Regional Development  
 Mid West Development Commission  
 Department of Industry and Resources  
 Office of the Director for Public Prosecutions for Western Australia  
 Peel Development Commission  
 Pilbara Development Commission  
 Department for Planning and Infrastructure  
 Western Australian Police Service  
 Department of Consumer and Employment Protection  
 Department of the Premier and Cabinet  
 South West Development Commission  
 Department of Sport & Recreation Western Australia  
 Department of Treasury and Finance  
 Water and Rivers Commission  
 WorkCover Western Australia  
 Wheatbelt Development Commission  
 Rottneest Island Authority  
 Western Australian Meat Industry Authority  
 Department of Culture and the Arts  
 Curriculum Council of Western Australia  
 Department of Education Services  
 Department of Racing, Gaming and Liquor  
 Office of the Inspector of Custodial Services  
 Law Reform Commission of Western Australia  
 State Supply Commission  
 Office of the Public Sector Standards Commissioner  
 Economic Regulation Authority  
 Office of Energy

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## AWARDS/AGREEMENTS—Variation of—

2004 WAIRC 11082

### ACTIV FOUNDATION (SALARIED OFFICERS) AWARD, NO. 13 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)

**APPLICANT**

-v-

THE BOARD OF MANAGEMENT, ACTIV FOUNDATION INCORPORATED

**RESPONDENT**

**CORAM**

COMMISSIONER P E SCOTT

**DATE OF ORDER**

WEDNESDAY, 7 APRIL 2004

**FILE NO**

APPLICATION 193 OF 2004

**CITATION NO.**

2004 WAIRC 11082

**Result**

Award varied

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*Order*

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Activ Foundation (Salaried Officers) Award, No. 13 of 1977 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 6<sup>th</sup> day of April 2004.

[L.S.]

(Sgd.) P.E. SCOTT,  
Commissioner.

SCHEDULE

**1. Clause 15. - Meal Money: Delete this clause and insert the following in lieu thereof:**

An employee required to work overtime before or after the employees ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of \$7.90 for breakfast, \$9.75 for the midday meal, and \$11.70 for the evening meal. Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

**2. Clause 21. - Motor Vehicle Allowance:**

**A. Delete subclause (4) of this clause and insert the following in lieu thereof:**

(4) Allowance for Towing Employer's Caravan or Trailer:

In cases where employees are required to tow employer's caravans on official business, the additional rate shall be 6.5 cents per kilometre. When an employer's trailer is towed on official business the additional rate shall be 3.5 cents per kilometre.

**B. Delete subclause (7) of this clause and insert the following in lieu thereof:**

(7) Requirement to Supply and Maintain a Motor Car:

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & □2600cc	1600cc □ Under
	Rate per kilometre (Cents)		
Kilometres Travelled			
Metropolitan Area:			
First 4000	149.7	126.6	102.2
Over 4000 – 8000	61.7	52.7	44.0
Over 8000 – 16000	32.4	28.1	24.6
Over 16000	34.0	28.8	24.7
South West Land Division			
First 4000	154.3	130.9	106.4
Over 4000 – 8000	64.0	54.8	46.0
Over 8000 – 16000	33.9	29.4	25.8
Over 16000	35.2	29.7	25.5

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & □2600cc	1600cc Under
	Rate per kilometre (Cents)		
Kilometres Travelled			
North of 23.5° South Latitude:			
First 4000	170.9	145.4	118.9
Over 4000 – 8000	70.3	60.2	50.7
Over 8000 – 16000	36.7	31.9	28.0
Over 16000	36.3	30.6	26.3
Rest of State:			
First 4000	159.2	134.8	109.2
Over 4000 – 8000	66.0	56.4	47.2
Over 8000 – 16000	34.9	30.2	26.5
Over 16000	35.7	30.1	25.9

**C. Delete subclause (8) of this clause and insert the following in lieu thereof:**

(8) Voluntary Use of a Motor Car:

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & □2600cc	1600cc □ Under
	Rate per kilometre (Cents)		
Metropolitan Area			
Metropolitan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5o South Latitude	78.7	67.3	56.4
Rest of the State	73.7	62.9	52.4

**D. Delete subclause (9) of this clause and insert the following in lieu thereof:**

## (9) Voluntary Use of a Motor Cycle:

Distance travelled during a year on Official Business

Rate per  
Kilometre □ (Cents)

All areas of the State

23.9

**3. Clause 26. - Travelling Transfers and Relieving Duty - Rates of Allowance: Delete this clause and insert in the following lieu thereof:**

ITEM	PARTICULARS	<u>COLUMN A</u> DAILY RATE	<u>COLUMN B</u> DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25(3)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 23(2))	<u>COLUMN C</u> DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25(b)(ii))
	ALLOWANCE TO MEET INCIDENTAL EXPENSES			
		\$	\$	\$
(1)	W.A. - South of 26° South Latitude	10.75		
(2)	W.A. - North of 26° South Latitude	13.65		
(3)	Interstate	13.65		
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL			
(4)	W.A. - Metropolitan Hotel or Motel	179.00	89.50	59.65
(5)	Locality South of 26° South Latitude	154.25	77.15	51.40
(6)	Locality North of 26° South Latitude:			
	Broome	237.10	118.55	79.05
	Carnarvon	204.20	102.10	68.05
	Dampier	183.45	91.70	61.15
	Derby	179.65	89.80	59.90
	Exmouth	194.40	97.20	64.80
	Fitzroy Crossing	286.15	143.05	95.40
	Gascoyne Junction	127.15	63.55	42.40
	Halls Creek	237.65	118.80	79.20
	Karratha	297.35	148.65	99.10
	Kununurra	244.45	122.25	81.50
	Marble Bar	177.65	88.80	59.20
	Newman	249.90	124.95	83.30
	Nullagine	150.20	75.10	50.05
	Onslow	178.75	89.40	59.60
	Pannawonica	183.15	91.55	61.05
	Paraburdoo	235.65	117.80	78.55
	Port Hedland	214.65	107.30	71.55
	Roebourne	127.40	63.70	42.45
	Sandfire	174.65	87.30	58.20
	Shark Bay	131.95	65.95	44.00
	Tom Price	210.65	105.30	70.20
	Turkey Creek	141.65	70.80	47.20
	Wickham	167.75	83.90	55.90
	Wyndham	152.15	76.05	50.70
(7)	Interstate - Capital City			
	Sydney	220.45	110.25	73.50
	Melbourne	226.45	113.25	75.50
	Other Capitals	185.00	92.50	61.60
(8)	Interstate - Other than Capital City	154.25	77.15	51.40

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25(3)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 23(2))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25(b)(ii))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
		\$	\$	\$
(9)	W.A. - South of 26° South Latitude	73.10		
(10)	W.A. - North of 26° South Latitude	85.25		
(11)	Interstate	85.25		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL NOT INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED				
(12)	W.A. - South of 26° South Latitude:			
	Breakfast	13.30		
	Lunch	13.30		
	Dinner	35.80		
(13)	W.A. - North of 26° South Latitude:			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
(14)	Interstate:			
	Breakfast	14.50		
	Lunch	23.75		
	Dinner	33.40		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 22(4))				
(15)	Each Adult	21.40		
(16)	Each Child	3.65		
MIDDAY MEAL (CLAUSE 21(11))				
(17)	Rate per meal	5.20		
(18)	Maximum reimbursement per pay period	26.00		

The allowances prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

**4. Clause 27. - Removal Allowance:**

**A. Delete subclause (1) of this clause and insert the following in lieu thereof:**

- (1) When a married employee is transferred in the employer's interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, he shall be reimbursed:
- The actual reasonable cost of conveyance of himself and his wife and children under 16 years of age or other children wholly dependent upon him.
  - The actual reasonable cost up to an amount of \$1100.00 for conveyance of his furniture, including insurance of such furniture whilst in transit unless a higher sum is approved by the employer in any special case: Provided that only necessary household furniture, effects and appliances shall be taken into account.  
In the event of a dispute, the matter may be referred to the Board of Reference for determination.
  - An allowance of \$520.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances: Provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least \$3,114.00.

**B. Delete subclause (6) of this clause and insert the following in lieu thereof:**

- (6) Where an employee is transferred to the employer's accommodation where furniture is provided and as a consequence is obliged to store his own furniture, he shall be reimbursed the actual cost of storage up to a maximum allowance of \$966.00 per annum. An allowance under this subclause shall not be paid for a period in excess of one year without the approval of the employer.

Provided that nothing in this subclause shall preclude the employer from reimbursing an employee the actual cost of storage where it exceeds the prescribed maximum allowance, if the employer considers that cost has been necessarily and reasonably incurred in the circumstances of a particular case.

2004 WAIRC 10898

**FIRE BRIGADE EMPLOYEES' AWARD, 1990, NO. A 28 OF 1989**  
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA

**PARTIES****APPLICANT**

-v-  
 FIRE AND EMERGENCY SERVICES AUTHORITY OF WESTERN AUSTRALIA

**RESPONDENT**

**CORAM** COMMISSIONER J H SMITH  
**DATE OF ORDER** TUESDAY, 16 MARCH 2004  
**FILE NO.** APPLICATION 1406 OF 2003  
**CITATION NO.** 2004 WAIRC 10898

**Result** Award varied  
**Representation**  
**Applicant** Mr R J Walker  
**Respondent** Mr K W Woo  
 Mr D J Ferguson

*Order*

Having heard Mr R J Walker on behalf of the Applicant and Mr K W Woo and Mr D J Ferguson on behalf of the Respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Fire Brigade Employees' Award, 1990 Award No A28 of 1989 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 16 March 2004.

(Sgd.) J H SMITH,  
 Commissioner.

[L.S.]

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**SCHEDULE**

1. **Clause 2. – Arrangement: Delete the words "34. Formula for Calculation of Weekly Wages" and insert the following in lieu thereof:**

34. Formula for Calculation of Penalties

2. Clause 6. - Wages: Delete this clause and insert the following in lieu thereof:

6. - WAGES

- (1) The base rate per week for shiftwork staff will be as follows:

<b>Classification</b>	<b>Base Rate per Week</b>
Trainee Firefighter	500.20
3rd Class Firefighter	537.00
2nd Class Firefighter	548.20
1st Class Firefighter	571.20
- Level 1	585.00
- Level 2	629.00
- Level 3	652.00
Senior Firefighter	675.00
Leading Firefighter	721.00
Station Officer	744.00
- Level 1	855.44
- Level 2	909.87
District Officer	
Superintendent	

- (2) The total weekly rate for employees specified in subclause (1) will be calculated by the sum of the base rate and 39.8% of that base rate of pay in lieu of all loadings and penalties accumulated as a consequence of working shift work as detailed in clauses 8 – Hours of Duty and 34 - Formula for Calculation of Penalties.

- (3) The rate of pay per week for fire safety assistants will be:

<b>Fire Safety Assistants</b>	
Grade 1	584.96
Grade 2	630.63
Grade 3	702.98
Grade 4	733.48
<b>Fire Safety Assistant (O'Connor Workshop)</b>	
Grade 1	584.96
Grade 2	630.63

- (4) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in the rates of pay otherwise made under the State wages Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

**3. Clause 7. – Promotions: Delete this clause and insert the following in lieu thereof:**

7. – PROMOTIONS

- (1) Firefighters will be eligible for progression through the firefighter classifications subject to the following:
- Upon attainment of the skills and competencies at the trainee level, a trainee firefighter will progress to the level of 3rd class firefighter.
  - 3rd class firefighters will progress to 2nd class after 1 year's satisfactory service in 3rd class and successful completion of the appropriate competency levels.
  - 2nd class firefighters will progress to 1st class, level 1 after 1 year's satisfactory service in 2nd class and successful completion of the appropriate competency levels.
  - 1st class level 1 firefighters will progress in 1st class level 2 after 1 year's satisfactory service in 1st class level 1 and successful completion of the appropriate competency levels.
  - 1st class level 2 firefighters will progress to 1st class, level 3 after 1 year's satisfactory service in 1st class level 2 and successful completion of the appropriate competency levels.
  - 1st class level 3 firefighters will progress to senior firefighter after 1 year's satisfactory service in 1st class level 3 and successful completion of the appropriate competency levels.
- (2) Promotion to vacancies at the Station Officer Level 1 rank will be from Senior Firefighters (or equivalent) who have successfully attained the appropriate competencies (or equivalent) as agreed between the parties in accordance with merit selection.
- (3) Promotion to Station Officer Level 2 rank will be from Station Officers (or equivalent) after two years service at Station Officer Level 1 who have successfully attained the appropriate competencies (or equivalent) as agreed between the parties.
- (4) Promotion to vacancies at the District Officer rank will be from Level 2 Station Officers (or equivalent) who have successfully attained the appropriate competencies (or equivalent) as agreed between the parties in accordance with merit selection.
- (5) Promotion to vacancies at Superintendent rank will be from District Officers (or equivalent) who have successfully attained the appropriate competencies (or equivalent) as agreed between the parties in accordance with merit selection.
- (6) A fire safety assistant will progress between the grades on attainment of the appropriate skills and competencies required for the position.

**4. Clause 34. - Formula for Calculation of Weekly Wages: Delete this clause and insert the following in lieu thereof:**

34. - FORMULA FOR CALCULATION OF PENALTIES

- (1) Introduction

The calculations are based on an annual cycle of the 10/14 roster system. The penalties are averaged over the four platoons over the entire year and paid as a fixed weekly amount. The calculations as set out below equates to a penalty rate of 39.8%.

Step 1 : Public Holidays and Weekend Penalties

	Days	Hours	Ord Hours	Penalty	Penalty Hours
Public Holidays	10.0	24	240	1.5	346.15
Saturdays	50.5	24	1212	0.5	606.
Sundays	50.5	24	1212	0.75	909.
Weekdays	242.5	24	5820	N/A	N/A
L.S.L.	10.5	24	252	N/A	N/A
SUB TOTAL	364.0		8736		1861.15
ADD 24 HOURS	1.0		24		5.10
TOTAL	365.0		8760		1866.25

Grand Total of Hours Paid = 8760 + 1866.25 = 10625.25

Hours Paid per Firefighter = 10625.25 ÷ 4 = 2656.56

Notes

- All hours worked on Public Holidays to be paid at the rate of double time and one half.
- Ordinary hours on Saturday to be paid at the rate of time and one half.
- Ordinary hours on Sunday to be paid at the rate of time and three quarters.
- The penalty hours on Public Holidays are reduced by 1/26th to compensate for the two weeks of ordinary time allowed for sick and long service leave.
- The average of penalty payments is applied to the additional day assuming that over the long term that day will fall on each day of the week.

**Step 2 : Shift Loadings**

All shifts are paid at a shift loading of 15% of the base rate. The loading applies to all week day shift excepting Public Holidays and Long Service Leave.

50.5 weeks x 5 days x 2 shifts - 20 p.h.shifts = 485 shifts per annum.

485 shifts ÷ 4 platoons = 121.5 shifts ÷ 52.166 weeks per year = 2.324311 shifts per employee per week.

BR x 15% ÷ 5 x 2.322311 = shift loading.

**Step 3 : Overtime Loading**

All overtime is paid at the rate of double time. Overtime is paid for 50 weeks and does not include periods of employment spent on sick leave or long service leave. Each overtime shift is an afternoon shift and therefore attracts the loading for shift work.

50 weeks x 8 hours x 1 T.penalty = 400 hours.

400 hours ÷ 4 platoons = 100 hours ÷ 52.166 = 1.916574 hours per week.

BR ÷ 40 x 1.15% x 1.916574 = overtime loading.

**Step 4 : Weekly Paid Hours**

BR ÷ 40 = hourly rate x 2656.56 = annual paid hours ÷ 52.166 = weekly paid hours.

total weekly wage = weekly paid hours + shift loading

+ over time loading.

**2004 WAIRC 10859****GRAIN HANDLING SALARIED OFFICERS' CONSOLIDATED AWARD 1989**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CO-OPERATIVE BULK HANDLING LIMITED

**APPLICANT**

-v-

WESTERN AUSTRALIAN GRAIN HANDLING SALARIED OFFICERS ASSOCIATION  
(UNION OF WORKERS)**RESPONDENT****CORAM**

COMMISSIONER J H SMITH

**DATE OF ORDER**

WEDNESDAY, 10 MARCH 2004

**FILE NO.**

APPLICATION 1619 OF 2003

**CITATION NO.**

2004 WAIRC 10859

**Result**

Award varied

**Representation****Applicant**

Ms N Waclawik

**Respondent**

Mr D Crook

*Order*

Having heard Ms N Waclawik on behalf of the Applicant and Mr D Crook on behalf of the Respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Grain Handling Salaried Officers' Consolidated Award 1989 No. 37 of 1965 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 18 February 2004.

[L.S.]

(Sgd.) J H SMITH,  
Commissioner.**SCHEDULE****1. Clause 31. – Salaries: Immediately following subclause (5) of this clause insert a new subclause as per the following:**

- (6) (a) Notwithstanding the above, employees will be able to enter into negotiations with respect to an individual salary package.
- (b) For the purposes of this award “salary packaging” shall mean an arrangement whereby the wage or salary benefit arising under a contract of employment is reduced, with another or other benefits to the value of the replaced salary being substituted and due to the employee.
- (c) An employer and employee bound by this award may enter into a salary packaging arrangement subject to the following —
- (a) The employer shall take all reasonable steps to ensure that any salary package complies with taxation and other relevant laws.
- (b) The employer shall record the arrangement at the time it is entered into, and provide a copy to the employee before the arrangement comes into effect.

- (d) The record shall include details of the employee's classification and salary level applying immediately prior to the salary packaging, coming into effect, and the details of the package.
- (e) The value of any agreed salary package, viewed objectively, shall not be less than the value of entitlements under this award which would otherwise apply.
- (f) The value of any agreed salary package, viewed objectively, shall not be greater than the value of the contractual benefits which would otherwise be due to the employee.
- (g) Salary packaging arrangements will be done in accordance with the CBH Salary packaging Policy, which will be consistent with the requirements of, this clause.
- (h) If an employee negotiates an individual salary package, he/she will be required to enter into a separate agreement with the employer that sets out the terms and conditions applying to the provision of their salary/wages and fringe benefits.

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**2004 WAIRC 10854**

**PRINTING (NEWSPAPER) AWARD 1979 NO. R23 OF 1979**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED  
INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH

**APPLICANT**

-v-

WEST AUSTRALIAN NEWSPAPERS LTD & OTHER

**RESPONDENTS**

**CORAM** COMMISSIONER S J KENNER  
**DATE** TUESDAY, 2 MARCH 2004  
**FILE NO** APPLICATION 1042 OF 2003  
**CITATION NO.** 2004 WAIRC 10854

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<b>Result</b>	Variation of an award
<b>Representation</b>	
<b>Applicant</b>	Mr D Hicks
<b>First Respondent</b>	Mr J Hetman
<b>Second Respondent</b>	No appearance

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*Order*

HAVING heard Mr D Hicks on behalf of the applicant, Mr J Hetman on behalf of the first respondent and there being no appearance on behalf of the second respondent the Commission, by consent, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT The Printing (Newspaper) Award 1979 be varied in accordance with the following schedule and that such variation shall have effect from the date hereof.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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SCHEDULE

- 1. Clause 15. – Overtime: Delete subclause (7) of this Clause and insert in lieu thereof the following:**
  - (7) Where an employee is entitled to a meal break pursuant to subclause (3) of Clause 16. – Meal Breaks of this Award and
    - (a) The employee has worked two hours or more of overtime immediately before any intermediate or night shift or immediately after a day shift, the employee will receive at least a thirty (30) minute unpaid meal break and be paid meal money of **\$8.80**.
    - (b) Where an employee works overtime that is continuous with their normal rostered shift and they work two hours or more overtime without a meal break, the employee will receive a thirty (30) minute meal break which will be paid for at the appropriate overtime rate.
- 2. Clause 30. – Computerised Typesetting:**
  - A. Delete paragraph (f) of subclause (3) of this clause and insert in lieu thereof the following:**
    - (f) A trainee on the perforator or other machines referred to in this subclause shall, if the trainee is a hand compositor, be paid **\$1.70** extra for the second three months. At the end of six months the trainee shall, if employed on those machines, be paid the rate for a machine compositor.
  - B. Delete paragraph (b) of subclause (4) of this clause and insert in lieu thereof the following:**
    - (b) A machine compositor employed in the computer room to assist in the control of the operation of the system shall be paid **\$9.80** per week extra while so engaged.
- 3. Clause 33. – Printing Machining: Delete this clause and insert in lieu thereof the following:**

An employee engaged in setting rollers, cleaning the presses in whatever situation shall receive a penalty of **\$4.20** per shift whilst engaged in such dirty occupation.

**4. Clause 39. – Wages: Delete this clause and insert in lieu thereof the following:**

- (1) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(a) **SUNDAY TIMES**

<b>Classification</b>	<b>Base Rate \$</b>	<b>Arbitrated Safety Net Adjustments \$</b>	<b>Total Wage \$</b>
<b>Adult</b>			
Compositor Displayer	525.80	123.00	648.80
Machine Compositor - Photo Composing	506.60	123.00	629.60
Machine Compositor – Elsewhere	492.70	123.00	615.70
Graphic Reproducer - Multi skilled	500.70	123.00	623.70
Graphic Reproducer – Basic	492.70	123.00	615.70
Hand Compositor	467.00	123.00	590.00
Composing Machine Mechanic – Basic	467.00	123.00	590.00
Composing Machine Mechanic - Skilled	492.70	123.00	615.70
Hand Compositor - Photo Composing	492.70	123.00	615.70
Guillotine Operator	467.00	123.00	590.00
Stereotyper	467.00	123.00	590.00
Reader	467.00	123.00	590.00
Assistant Reader	392.40	123.00	515.40
Printing Machinist	492.70	123.00	615.70
Brake Hand	422.10	125.00	547.10
Publishing Hand A	420.30	125.00	545.30
Publishing Hand B	382.30	123.00	505.30
Newsprint Storeman	398.30	123.00	521.30
General Hand	391.30	123.00	514.30

(b) **WEST AUSTRALIAN NEWSPAPERS**

<b>Classification</b>	<b>Base Rate \$</b>	<b>Arbitrated Safety Net Adjustments \$</b>	<b>Total Wage \$</b>
<b>Adult</b>			
Compositor Grade 1	523.80	123.00	646.80
Compositor Grade 2 (includes System Mechanics)	492.70	123.00	615.70
Graphic Reproducer - Grade 1	500.90	123.00	623.90
Graphic Reproducer - Grade 2	492.70	123.00	615.70
Hand Compositor	467.00	123.00	590.00
Reader	467.00	123.00	590.00
Printing Machinist	467.00	123.00	590.00
Assistant Machinist	400.20	123.00	523.20
Publishing Hand - Grade 1	398.30	123.00	521.30
Publishing Hand - Grade 2	382.30	123.00	505.30
General Hand	371.30	123.00	494.30

- (2) Apprentices (per cent of compositors weekly wage)

(a) <b>Five Year Term</b>	<b>%</b>
On commencement	35
First increment	45
Second increment	60
Third increment	75
Fourth increment	85
(b) <b>Four Year Term</b>	<b>%</b>
On commencement	45
First increment	60
Second increment	75
Third increment	85

Subject to the provisions of Clause 28. - Apprentices of this award and to any order made by the Commission the foregoing increments shall accrue annually.

- (3) Cadet Assistant Readers (per cent of Assistant Reader's weekly rate)

	%
First year of cadetship	50
Second year of cadetship	65
Third year of cadetship	80
Fourth year of cadetship	95

Provided that a cadet who, at the date of this award, is receiving more than the amount payable under this subclause shall not have their wage rate reduced.

- (4) Night and intermediate shift loading

Adult - 17.5% of the hand compositors day work wage rate.

Apprentices and Cadet Assistant Readers in their final year 17.5% of the hand compositors day work wage rate.

Other apprentices and cadets five sixths of the night and intermediate shift loading of the adult rate.

- (5) The proportion of general hands to other employees in sections other than the machine rooms and stereotyping room shall not exceed one to four or fraction of four and in the machine rooms and stereotyping room shall not exceed two to three.

**2004 WAIRC 10909**

**ROCK LOBSTER AND PRAWNS PROCESSING AWARD 1978  
NO R4 OF 1977**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

FOOD PRESERVERS UNION OF WESTERN AUSTRALIA, UNION OF WORKERS

**APPLICANT**

-v-

M G KAILIS GULF FISHERIES PTY LTD AND OTHERS

**RESPONDENT**

**CORAM**

COMMISSIONER J L HARRISON

**DATE OF ORDER**

THURSDAY, 18 MARCH 2004

**FILE NO**

APPLICATION 1013 OF 2003

**CITATION NO.**

2004 WAIRC 10909

**Result**

Award varied

*Order*

HAVING heard Mr T Pope on behalf of the applicant and Mr P Robertson as agent on behalf of some of the respondents, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Rock Lobster and Prawns Processing Award 1978 (No R4 of 1977) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 18<sup>th</sup> day of March 2004.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

**SCHEDULE**

- 1. Clause 7. – Wages:- Delete subclause (4) of this clause and insert the following in lieu thereof:**

- (4) Leading Hands (per week extra):

In charge of -	\$
(a) Less than three other employees	12.20
(b) Not less than three and not more than ten other employees	24.40
(c) More than ten but not more than twenty other employees	35.65
(d) More than twenty other employees	47.45

- 2. Clause 9. – Overtime:- Delete subclause (3)(a) of this clause and insert the following in lieu thereof:**

- (3) (a) An employee required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid \$8.50 for a meal. If owing to the amount of overtime a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid \$5.85 for each meal so required.

- 3. Clause 22. – Cold Chambers:- Delete subclause (3) of this clause and insert the following in lieu thereof:**

- (3) An employee shall receive forty two cents for every hour of which he/she spends twenty minutes or more in a cold chamber in which the temperature is less than 0° Celsius in addition to his/her ordinary rate.

2004 WAIRC 11081

**SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)	<b>APPLICANT</b>
	-v-	
	ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA (INCORPORATED)	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT	
<b>DATE OF ORDER</b>	WEDNESDAY, 7 APRIL 2004	
<b>FILE NO</b>	APPLICATION 192 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11081	

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**Result** Award varied

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*Order*

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Salaried Officers (Association for the Blind of Western Australia) Award, 1995 (No. A 5 of 1995) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 6<sup>th</sup> day of April 2004.

(Sgd.) P.E. SCOTT,  
Commissioner.

[L.S.]

**SCHEDULE**

**1. Clause 12. - Meal Money: Delete this clause and insert in lieu thereof the following:**

An employee required to work overtime before or after the employees ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of \$7.90 for breakfast, \$9.75 for the midday meal, and \$11.70 for the evening meal. Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

**2. Clause 18. - Motor Vehicle Allowance**

**A. Delete Subclause (4) of this clause and insert the following in lieu thereof:**

(4) Allowance for Towing Employer's Caravan or Trailer:

In cases where employees are required to tow employer's caravans on official business, the additional rate shall be 6.5 cents per kilometre. When an employer's trailer is towed on official business the additional rate shall be 3.5 cents per kilometre.

**B. Delete Subclause (7) of this clause and insert the following in lieu thereof:**

(7) Requirement to Supply and Maintain a Motor Car:

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & □2600cc	1600cc □ Under
	Rate per kilometre (Cents)		
Kilometres Travelled			
Metropolitan Area:			
First 4000	149.7	126.6	102.2
Over 4000 – 8000	61.7	52.7	44.0
Over 8000 – 16000	32.4	28.1	24.6
Over 16000	34.0	28.8	24.7
South West Land Division			
First 4000	154.3	130.9	106.4
Over 4000 – 8000	64.0	54.8	46.0
Over 8000 – 16000	33.9	29.4	25.8
Over 16000	35.2	29.7	25.5
North of 23.5° South Latitude:			
First 4000	170.9	145.4	118.9
Over 4000 – 8000	70.3	60.2	50.7
Over 8000 – 16000	36.7	31.9	28.0
Over 16000	36.3	30.6	26.3

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & □2600cc	1600cc □ Under
Kilometres Travelled	Rate per kilometre (Cents)		
Rest of State:			
First 4000	159.2	134.8	109.2
Over 4000 – 8000	66.0	56.4	47.2
Over 8000 – 16000	34.9	30.2	26.5
Over 16000	35.7	30.1	25.9

**C. Delete Subclause (8) of this clause and insert the following in lieu thereof:**

(8) Voluntary Use of a Motor Car:

Area Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc - & □2600cc	1600cc □ Under
	Rate per kilometre (Cents)		
Metropolitan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5o South Latitude	78.7	67.3	56.4
Rest of the State	73.7	62.9	52.4

**D. Delete Subclause (9) of this clause and insert the following in lieu thereof:**

(9) Voluntary Use of a Motor Cycle:

Distance travelled during a year on Official Business	Rate per Kilometre □ (Cents)
All areas of the State	23.9

**3. Clause 21. - Travelling, Transfers and Relieving - Rates of Allowance: Delete this clause and insert the following in lieu thereof:**

ITEM	PARTICULARS	COLUMN A DAILY RATE
	ALLOWANCE TO MEET INCIDENTAL EXPENSES	\$
(1)	WA - South of 26° South Latitude	10.75
(2)	WA - North of 26° South Latitude	13.65
(3)	Interstate	13.65
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL	
(4)	WA - Metropolitan Hotel or Motel	179.00
(5)	Locality South of 26° South Latitude	154.25
(6)	Locality North of 26° South Latitude	
	Broome	237.10
	Carnarvon	204.20
	Dampier	183.45
	Derby	179.65
	Exmouth	194.40
	Fitzroy Crossing	286.15
	Gascoyne Junction	127.15
	Halls Creek	237.65
	Karratha	297.35
	Kununurra	244.45
	Marble Bar	177.65
	Newman	249.90
	Nullagine	150.20
	Onslow	178.75
	Pannawonica	183.15
	Paraburdoo	235.65
	Port Hedland	214.65
	Roebourne	127.40
	Sandfire	174.65
	Shark Bay	131.95

ITEM	PARTICULARS	COLUMN A DAILY RATE
ALLOWANCE TO MEET INCIDENTAL EXPENSES		
		\$
	Tom Price	210.65
	Turkey Creek	141.65
	Wickham	167.75
	Wyndham	152.15
(7)	Interstate - Capital City	
	Sydney	220.45
	Melbourne	226.45
	Other Capitals	185.00
(8)	Interstate - Other than Capital City	154.25
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL		
(9)	WA - South of 26° South Latitude	73.10
(10)	WA - North of 26° South Latitude	85.25
(11)	Interstate	85.25
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED		
(12)	WA - South of 26° South Latitude:	
	Breakfast	13.30
	Lunch	13.30
	Dinner	35.80
(13)	WA - North of 26° South Latitude	
	Breakfast	14.50
	Lunch	23.75
	Dinner	33.40
(14)	Interstate	
	Breakfast	14.50
	Lunch	23.75
	Dinner	33.40
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE (19)(11))		
(15)	Each Adult	21.40
(16)	Each Child	3.65
MIDDAY MEAL (CLAUSE (19)(11))		
(17)	Rate per meal	5.20
(18)	Maximum reimbursement per pay period	26.00

The allowances prescribed in this clause shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award, 1992.

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## AGREEMENTS—Industrial—Retirements from—

CONA-STRUCT / CFMEUW COLLECTIVE AGREEMENT 2002

No. AG 55 of 2002

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 229 of 2004

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Cona-Struct Pty Ltd (CAN 068 392 205) will cease to be a party to the Cona-Struct / CFMEUW Collective Agreement 2002 No AG 55 of 2002 on and from the 25 June 2004.

Dated at Perth this 16 April 2004.

J. SPURLING,  
Registrar.

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## CANCELLATIONS OF AWARDS/AGREEMENTS/ RESPONDENTS—

2004 WAIRC 11029

### BURSWOOD ISLAND RESORT EMPLOYEES AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>PARTIES</b>	ON THE COMMISSION'S OWN MOTION
<b>CORAM</b>	CHIEF COMMISSIONER W S COLEMAN
<b>DATE</b>	THURSDAY, 1 APRIL 2004
<b>FILE NO/S</b>	APPLICATION 448 OF 2004
<b>CITATION NO.</b>	2004 WAIRC 11029

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**Result** Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

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*Order*

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 25<sup>th</sup> day of February 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 26<sup>th</sup> day of March 2004 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Burswood Island Resort Employees Award, No A23 & A25 of 1985

[L.S.]

(Sgd.) W S COLEMAN,  
Chief Commissioner.

2004 WAIRC 11025

### GRAIN POOL OF W.A. ADMINISTRATIVE AND CLERICAL OFFICERS AWARD 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>PARTIES</b>	ON THE COMMISSION'S OWN MOTION
<b>CORAM</b>	CHIEF COMMISSIONER W S COLEMAN
<b>DATE</b>	THURSDAY, 1 APRIL 2004
<b>FILE NO/S</b>	APPLICATION 447 OF 2004
<b>CITATION NO.</b>	2004 WAIRC 11025

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**Result** Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

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*Order*

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 17<sup>th</sup> day of December 2003 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 16<sup>th</sup> day of January 2004 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Grain Pool of W.A. Administrative and Clerical Officers Award 1978, No 15 of 1978

[L.S.]

(Sgd.) W S COLEMAN,  
Chief Commissioner.

2004 WAIRC 11027

### PAINTERS' (GOVERNMENT SHIPPING) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>PARTIES</b>	ON THE COMMISSION'S OWN MOTION
<b>CORAM</b>	CHIEF COMMISSIONER W S COLEMAN
<b>DATE</b>	THURSDAY, 1 APRIL 2004
<b>FILE NO/S</b>	APPLICATION 449 OF 2004
<b>CITATION NO.</b>	2004 WAIRC 11027

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**Result** Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

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*Order*

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 25<sup>th</sup> day of February 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 26<sup>th</sup> day of March 2004 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Painters' (Government Shipping) Award, No 32 of 1961

[L.S.]

(Sgd.) W S COLEMAN,  
Chief Commissioner.

**2004 WAIRC 11030**

**POLICE CADETS' AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ON THE COMMISSION'S OWN MOTION

**CORAM**

CHIEF COMMISSIONER W S COLEMAN

**DATE**

THURSDAY, 1 APRIL 2004

**FILE NO/S**

APPLICATION 450 OF 2004

**CITATION NO.**

2004 WAIRC 11030

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**Result** Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

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*Order*

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 25<sup>th</sup> February 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 26<sup>th</sup> day of March 2004 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

Police Cadets' Award, No R7 of 1976

[L.S.]

(Sgd.) W S COLEMAN,  
Chief Commissioner.

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## NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**APPLICATION NO. A4 OF 2004**

**APPLICATION FOR REGISTRATION OF AN AWARD**

**ENTITLED "THE AUSTRALIAN WORKERS UNION ROAD MAINTENANCE, MARKING AND TRAFFIC MANAGEMENT AWARD 2002"**

NOTICE is given that an application has been made to the Commission by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

1.3 - AREA & SCOPE

This award applies to employees in the State of Western Australia employed in any of the classifications in Clause 4.3 – Classification Structure and Definitions in or in connection with the industries or callings listed in the State of Western Australia:

Roads, freeways, causeways, aerodromes, drains, dams, weirs, bridges, overpasses, underpasses, channels, waterworks, pipe tracks, tunnels, water and sewerage works, conduits, and all concrete work and preparation incidental thereto.

4.2 - WAGES

- (1) Employee Classifications:  
     Trainee Traffic Controller – First 3 months probation  
     Traffic Controller

Traffic Controller Team Leader

A copy of the proposed Award may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING  
Registrar.

8 April 2004.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**APPLICATION NO. A5 OF 2004**

**APPLICATION FOR REGISTRATION OF AN AWARD  
ENTITLED "AWU LABOUR HIRE INDUSTRY AWARD 2004"**

NOTICE is given that an application has been made to the Commission by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

1.3 - AREA & SCOPE

This award applies throughout the State of Western Australia to all employers operating in the Labour Hire Industry employing any employees (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though employee is working for the other person under an arrangement between the agency or organisation and the other person eligible for membership of the Australian Workers Union, West Australian Branch Industrial Union of Workers employed in the classifications in Clause 4.3 – Classification Structure and Definitions.

1.5 – APPLICATION OF OTHER AWARDS

This award shall apply except to the extent that the site on which the Labour Hire contractor has provided labour is covered by an Enterprise Award and/or Site Industrial Agreement, where the terms and conditions are superior to this Award, then that Enterprise Award or Agreement shall apply in lieu of this Award.

4.2 - WAGES

- (2) Adult Employee Classifications:
- Level 1
  - Level 2
  - Level 3
  - Level 4
  - Level 5
  - Level 6
  - Level 7
  - Level 8
  - Level 9
  - Level 10

A copy of the proposed Award may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,  
Registrar.

7 April 2004.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**APPLICATION 1438 OF 2003**

**APPLICATION FOR JOINDER OF A PARTY TO THE AWARD ENTITLED  
"BURSWOOD RESORT CASINO (THEATRICAL EMPLOYEES) AWARD No. A 10 OF 1991"**

NOTICE is given that an application has been made to the Commission by The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) to join as a party to the award Burswood Catering and Entertainment Pty Ltd.

In so far as the application affects the Area and Scope of the award, the following proposed variations which give effect to this joinder are published:

1. Delete clause 3 – AREA AND SCOPE and insert thereof the following;

3 – AREA AND SCOPE

This award shall be binding upon Burswood Resort (Management) Limited and any successor, assignee or transferee of Burswood Resort Management Limited in its capacity as Manager of the Burswood Property Trust and upon Burswood Catering and Entertainment Pty Ltd, and upon all employees employed in the callings described in Clause 6 – Rates of Pay, of this award.

2. Delete subclause (1) of Clause 4 – DEFINITIONS and insert in lieu thereof the following;

(1) "Company" means:

- (i) Burswood Resort (Management) Limited and any successor, assignee or transferee of Burswood Resort Management Limited in its capacity as Manager of the Burswood Property Trust; or

- (ii) Burswood Catering and Entertaining Pty Ltd; as the case may be.
3. Delete SCHEDULE A – PARTIES and insert in lieu thereof the following;

**SCHEDULE A – PARTIES**

Burswood Resort (Management) Limited

Burswood Catering and Entertainment Pty Ltd

The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,  
Registrar.

26 March 2004.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 57 of 2004**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED  
"FISH FEAST CANNING VALE SDA AGREEMENT 2003"**

NOTICE is given that an application has been made to the Commission by The Shop Distributive and Allied Employees Association of Western Australia under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**3.-AREA AND SCOPE**

This Agreement shall be binding upon Danset Holdings Pty Ltd (Daniel Lau and Set Lau) trading as Fish Feast (hereinafter referred to as "Fish Feast"), the Shop Distributive and Allied Employees' Association of Western Australia (hereinafter referred to as "the Union") and the employees of Fish Feast who are employed in the classifications set out in Clause 6, of this Agreement and who are members or eligible to be members of the Union.

**6. DEFINITIONS**

- (1) "Employee Grade I" shall mean an employee engaged by Fish Feast who is in the first six months of employment and who is gaining the skills required of an Employee Grade II or Grade III.
- (2) "Employee Grade II" shall mean an employee with not less than six months service with Fish Feast who is engaged to assist with the preparation, assembly, cooking or packing of product for sale; the maintenance of the work area at a standard of cleanliness as determined by Fish Feast; the cleaning of cooking utensils, cutlery and glassware; the delivery of product to the customer outside the establishment and/or performs customer service functions including the taking of orders by any means, the entering of information onto a computer, the receipt of monies or other duties involving customer contact.
- (3) "Employee Grade III" shall mean an employee who is required to work in an "in charge" capacity giving direction to Employees Grade I and/or Grade II or being in charge of the shop while working singly.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J A SPURLING  
REGISTRAR

30 March 2004

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**Application No. AG 51 of 2004**

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED  
"FISH FEAST HALLS HEAD SDA AGREEMENT 2003"**

NOTICE is given that an application has been made to the Commission by The Shop Distributive and Allied Employees Association of Western Australia under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**3.-AREA AND SCOPE**

This Agreement shall be binding upon Clyde Corporation Pty Ltd (William Liddle and Cathy Liddle) trading as Fish Feast (hereinafter referred to as "Fish Feast"), the Shop Distributive and Allied Employees' Association of Western Australia (hereinafter referred to as "the Union") and the employees of Fish Feast who are employed in the classifications set out in Clause 6, of this Agreement and who are members or eligible to be members of the Union.

**6. DEFINITIONS**

- (1) "Employee Grade I" shall mean an employee engaged by Fish Feast who is in the first six months of employment and who is gaining the skills required of an Employee Grade II or Grade III.
- (2) "Employee Grade II" shall mean an employee with not less than six months service with Fish Feast who is engaged to assist with the preparation, assembly, cooking or packing of product for sale; the maintenance of the work area at a standard of cleanliness as determined by Fish Feast; the cleaning of cooking utensils, cutlery and glassware; the delivery of product to the customer outside the establishment and/or performs customer service functions including the taking of orders by any means, the entering of information onto a computer, the receipt of monies or other duties involving customer contact.

- (3) "Employee Grade III" shall mean an employee who is required to work in an "in charge" capacity giving direction to Employees Grade I and/or Grade II or being in charge of the shop while working singly.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J A SPURLING  
REGISTRAR

30 March 2004

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 56 of 2004

**APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED**  
**"FISH FEAST MALAGA SDA AGREEMENT 2003"**

NOTICE is given that an application has been made to the Commission by The Shop Distributive and Allied Employees Association of Western Australia under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

**3.-AREA AND SCOPE**

This Agreement shall be binding upon Coslati Investments Pty Ltd (Francesco Galati and George Cosentino) trading as Fish Feast (hereinafter referred to as "Fish Feast"), the Shop Distributive and Allied Employees' Association of Western Australia (hereinafter referred to as "the Union") and the employees of Fish Feast who are employed in the classifications set out in Clause 6, of this Agreement and who are members or eligible to be members of the Union.

**6. DEFINITIONS**

- (1) "Employee Grade I" shall mean an employee engaged by Fish Feast who is in the first six months of employment and who is gaining the skills required of an Employee Grade II or Grade III.
- (2) "Employee Grade II" shall mean an employee with not less than six months service with Fish Feast who is engaged to assist with the preparation, assembly, cooking or packing of product for sale; the maintenance of the work area at a standard of cleanliness as determined by Fish Feast; the cleaning of cooking utensils, cutlery and glassware; the delivery of product to the customer outside the establishment and/or performs customer service functions including the taking of orders by any means, the entering of information onto a computer, the receipt of monies or other duties involving customer contact.
- (3) "Employee Grade III" shall mean an employee who is required to work in an "in charge" capacity giving direction to Employees Grade I and/or Grade II or being in charge of the shop while working singly.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J A SPURLING  
REGISTRAR

30 March 2004

**PUBLIC SERVICE ARBITRATOR—Matters dealt with—**

2004 WAIRC 10869

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>APPLICANT</b>
	-v-	
	GOVERNING COUNCIL OF CENTRAL TAFE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON PUBLIC SERVICE ARBITRATOR	
<b>DATE</b>	FRIDAY, 12 MARCH 2004	
<b>FILE NO</b>	PSACR 31 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10869	

**Catchwords** Jurisdiction of Public Service Arbitrator – Jurisdiction to order that the employment status of an officer be converted to permanent – Whether officer meets the criteria for conversion to permanency – Procedure for appointment of officers – Whether order sought constitutes appointment of officer – Arbitrator held to have jurisdiction – Order that the employment status of officer be converted to permanent – Industrial Relations Act 1979 (WA) s 80E(7); Public Sector Management Act 1994 (WA) s 97(1)(a)

**Result** Jurisdiction found. Order issued.

**Representation**

**Applicant** Mr J Ross

**Respondent** Mr P Wishart and with him Mr D Matthews (of counsel)

*Reasons for Decision*

1 Mr Lewis Stevens is employed by the Governing Council of Central TAFE (“the respondent”). As a result of a dispute about Mr Stevens’ conversion to permanent status the Civil Service Association of Western Australia (Incorporated) (“the applicant”) commenced proceedings under the *Industrial Relations Act 1979* (“the Act”) claiming Mr Stevens should have been converted to a permanent position under the terms of the Premier’s Circular No 17 of 2002 (“the Circular”) issued on 23 October 2002 relating to Fixed Term Contract Staff (Exhibit A1). Conciliation proceedings did not resolve the dispute and the matter was referred for hearing and determination under s44(9) of the Act. The matter set down for hearing and determination is as follows:

“The applicant is claiming that on the basis that the Governing Council of Central TAFE failed to comply with Premier’s Circular 2002/17 as amended in respect to the conversion of Mr Lewis Stevens from a fixed term contract employee to a permanent employee the following is sought:

1. (a) A Declaration that Mr Lewis Stevens satisfies the criteria for conversion to permanency as outlined in Premier’s Circular 2002/17.
- (b) An Order that the respondent convert Mr Lewis Stevens’ employment status from contract to permanent.

The respondent opposes the Commission issuing the Declaration and Order sought by the applicant.”

2 At the hearing the applicant stated that it was now seeking the following orders:

1. An Order that the employers’ decision not to convert Mr Lewis Stevens’ employment status from contract to permanency in accordance with the criteria determinant contained in Premier’s Circular 2002/17, be nullified.
2. A Declaration that Mr Lewis Stevens satisfies the criteria determinant for conversion to permanency contained in the Premier’s Circular 2002/17, for the conversion of entry level Government officers to permanent status.
3. An Order that the respondent convert Mr Lewis Stevens’ employment status from contract to permanent.

Background

3 Mr Stevens commenced employment with the respondent in January 2001 on a casual part time basis. Since July 2001 Mr Stevens has been employed by the respondent on a series of continuous short term full-time contracts working 75 hours per fortnight as a Library Technician Level 2. Since this application was lodged Mr Stevens continues to be employed by the respondent on a contract basis in a Library Technician Level 2 position pending the outcome of this application.

Applicant’s evidence

- 4 In April 2002 Mr Stevens applied for a permanent Level 2 position as a Library Technician at the respondent’s Perth campus which was advertised in the Western Australian Public Sector magazine, the Intersector (Exhibit A4). He was interviewed for this position on 20 May 2002. He stated that even though he was unsuccessful in being appointed to this position he was told by Mr John Cloake, the chairperson of the selection panel, that he had been highly competitive for the position. Mr Cloake also told Mr Stevens that the person who had won the position had done so very narrowly and that had there been a second position available he would have given Mr Stevens the benefit of that position.
- 5 Mr Stevens stated that the respondent’s intranet is accessed by its 2,000 employees. He confirmed that of respondent’s six campuses, five have Libraries. Mr Stevens understood that there are approximately eight Level 2 Library Technicians and approximately nine Level 1 Library Assistant positions in the respondent’s libraries and he was aware that a number of Library Assistants have similar qualifications to that of a Library Technician.
- 6 In June 2002, as there was a moratorium on advertising permanent positions, the respondent advertised for expressions of interest on the respondent’s intranet network for a contract position of up to five months for a Level 2 Library Technician position at the respondent’s Perth Campus (Exhibit A5). Mr Stevens submitted a written application for this position and on 19 June 2002 he was advised that he was the successful applicant for this position as a result of a selection process being completed (Exhibit A6).
- 7 After becoming aware of the Circular and believing he fulfilled the requirements for conversion to permanent status Mr Stevens applied to be converted to permanent status in November 2002. When Mr Stevens’ application for conversion to permanent status was rejected Mr Stevens sought to have his application reviewed. A report then was prepared by an external consultant Mr Ian Flack (Exhibit A9). The report found that Mr Stevens did not meet the Circular’s requirements for conversion to permanent status on the basis that the expression of interest process in June 2002 was not open, the advertisement process for the expression of interest position was not appropriate for a permanent position and his conversion was contrary to the Public Sector Standard on Recruitment, Selection and Appointment (“the Standard”). Mr Stevens disagreed with Mr Flack’s findings as he believed his existing position had been widely advertised and that he had been selected on merit for his existing position.
- 8 Under cross-examination Mr Stevens confirmed that he had been successfully undertaking Level 2 duties throughout the whole of his employment with the respondent and that no issues of concern about his performance had been raised by the respondent. He agreed that he was not interviewed for the expression of interest position that was advertised in June 2002 and he subsequently found out that he was the only applicant for this position.

Respondent’s evidence

- 9 Ms Lucinda Corless is the Acting Director of the respondent’s Business Support Unit. Prior to taking up this position she worked on human resource strategy and workforce planning for the respondent. Her role includes ensuring that the respondent complies with the Circular’s implementation guidelines. Ms Corless is aware of Mr Stevens’ employment history with the respondent. She stated that in July 2001 a short term vacancy arose for a full-time Level 2 Library Technician position and Mr Stevens was offered this position on a contract basis without undergoing a full selection process. Mr Stevens was then employed on a series of short term full-time contracts on an ongoing basis until June 2002 when his Level 2 position eventually became vacant on a permanent basis. As there was a moratorium at this time on permanently filling vacant positions Mr Stevens’ Level 2 position was filled through an expression of interest process. Ms Corless gave evidence that the respondent does not undertake a full merit selection process when expressions of interest are called for and she stated that under this process a person could be appointed to a position on reasons apart from merit. She confirmed that the respondent had the ability to appoint employees for up to 12 months using the expression of interest process. If a position is to be vacant for more than 12 months then as a minimum the position is required to be advertised in the Intersector and on the internet based recruitment website, SEEK. Positions can also be advertised in the local newspaper and various trade journals.

- 10 Ms Corless stated that it was her view that Mr Stevens did not fill his current position by open competition as the expression of interest process for this position excluded people who were not employed by the respondent from applying. She stated that one of the reasons why Mr Stevens was appointed to the Level 2 position in June 2002 was because he provided continuity of service for the respondent and that if there was not a moratorium on advertising the position in June 2002 then the respondent would have advertised the position both internally and externally at the time.
- 11 Ms Corless stated that when the Circular was initially generated she met with other TAFE human resource managers and a consensus was reached about the definition of open competition. The consensus was that open competition included advertising at least external to the TAFE College that had the vacant position. Ms Corless understood that this position was adopted and applied across the board by all TAFE Colleges. Ms Corless confirmed that after the respondent had reviewed Mr Stevens' status at its own initiative Mr Stevens was not converted to permanent status under the terms of the Circular because the respondent considered that he did not fulfil the requirements of the definition of open competition given that he obtained his current position via an expression of interest process that was only advertised within the respondent's operations.
- 12 Under cross-examination Ms Corless stated that when the respondent offers employees short term contracts they are not selected on merit for these positions. She stated that the area Manager has the discretion to decide whether or not an employee has the ability to undertake the requirements of a particular position. Ms Corless confirmed that the respondent had no issue with Mr Stevens' ability to undertake the duties required of him in the Level 2 Library Technician position. Ms Corless stated that as Mr Stevens had not been fully assessed when he was appointed to the Level 2 position under the expression of interest process, which involved advertising internally, then Mr Stevens did not meet the requirements of the Circular. Ms Corless confirmed that of the respondent's 2,000 employees, between 20 to 40 employees were Level 1 employees who worked in the respondent's Learning Resources Centres and at front counters, and approximately 40 to 60 employees worked in Level 2 positions in the respondent's Administration areas and Learning Resource Centres. Ms Corless stated that persons employed in permanent Level 2 positions did not often apply for other Level 2 positions when these positions were contract positions.

#### Submissions

- 13 The applicant argues that the Public Service Arbitrator ("the Arbitrator") has jurisdiction to deal with this matter and does not agree with the respondent's submissions that the terms of s80E(7) of the Act precludes the Arbitrator from dealing with this application. The applicant argues that the Standard does not apply to Mr Stevens' conversion to permanent status.
- 14 The applicant argues that the Arbitrator is not limited by the terms of s80E(7) of the Act and s97(1)(a) of *Public Sector Management Act 1994* (the "PSM Act") in this case as there is no Public Sector Standard applying to Mr Stevens' conversion under the Circular from being employed under a series of full-time contracts of limited duration to becoming a permanent employee.
- 15 The applicant does not dispute that the Arbitrator does not have the jurisdiction to deal with a procedure referred to in a Public Sector Standard by virtue of the provisions of s80E(7) of the Act and s97(1)(1) of the PSM Act.
- 16 The Standard is as follows:

#### **"Recruitment, Selection and Appointment Standard**

##### **Outcome**

The most suitable and available people are selected and appointed.

##### **The Standard**

The minimum standard of merit, equity and probity is met for recruitment, selection and appointment if:

- ⚡⚡ **A proper assessment matches a candidate's skills, knowledge and abilities with the work-related requirements of the job and the outcomes sought by the public sector body, which may include diversity.**
- ⚡⚡ **The process is open, competitive and free of bias, unlawful discrimination, Nepotism or patronage.**
- ⚡⚡ **Decisions are transparent and capable of review.**

”

Exhibit A3

- 17 The applicant argues that the process of converting Mr Stevens to permanent status is not an appointment as provided for in the Standard. In this case, Mr Stevens is currently on a fixed term contract and he is seeking to be converted and confirmed to permanent status under the provisions of the Circular. The applicant argues that as the Circular refers to the process of an employee attaining permanent status by the confirmation of indefinite tenure this does not involve Mr Stevens being appointed to a position. In support of this argument the applicant relies on the definition of "confirmation" in the New Short Oxford English Dictionary which states:

"The formal act of ratifying an appointment, election, decision, etc."

(Exhibit A2)

As Mr Stevens has not been selected and appointed to a permanent position under the normal processes relevant to the Standard then the Standard does not apply to Mr Stevens' application for conversion to permanent status. Thus the terms of s97(1)(a) of the PSM Act do not have application in this case.

- 18 The applicant argues that the combined effect of ss7, 8, 9 and 10 of the PSM Act gives the Premier the power to establish policies, procedures and processes and neither the Premier nor the Commissioner for Public Sector Standards has prescribed standards for confirmation to permanency.
- 19 The applicant therefore argues that as no Public Sector Standard applies to Mr Stevens' conversion to permanent status under the terms of the Circular the Arbitrator has jurisdiction to deal with this matter.

- 20 The applicant maintains that there is no inconsistency in the terms of the Standard and in the applicant's interpretation of the definition of open competition in the Circular. The applicant maintains that when Mr Stevens was appointed to a Level 2 position in June 2002 he was appointed after the position was advertised as widely as appropriate in the circumstances and he was selected for the position on merit. The applicant argues that the Arbitrator should take into account that even though the expression of interest notice that Mr Stevens responded to in June 2002 was only advertised within the respondent's operations, the expression of interest required that an applicant for this position undertake all of the same duties and skills required of an applicant for the permanent Level 2 Library Technician position that Mr Stevens had applied for approximately four weeks prior to this date (Exhibits A4 and A5). When Mr Stevens applied for and was interviewed for the same Level 2 position in May 2002 he was interviewed for this position after it had been advertised external to and within the respondent's operations. Even though Mr Stevens was unsuccessful in being appointed to this position he was informed that he was the second preferred candidate for this position. The applicant argues that Mr Stevens would not have been appointed to the Level 2 position on a temporary basis in June 2002 unless he was able to fulfil the merit requirements of this position. As Mr Stevens had recently met the requirements of the same Level 2 position which was advertised internally and externally it was therefore open to the respondent to reach the view that Mr Stevens had achieved his current Level 2 position through open competition. In support of this submission the applicant relies on the Office of the Public Sector Standards Commissioner advice on the interpretation of the Standard relating to appointments. The applicant argues that as this practice is used in relation to appointments under the Standard then it could also be used for confirmation of permanency. This advice from the Office of the Public Sector Standards Commissioner website dated 5 November 2003, is as follows:

*"Can an agency not advertise and use a previous selection process to appoint someone to an identical job that becomes vacant at a later stage?"*

It depends on the job and the circumstances. The following is just a guide:

- If the jobs are identical and the time lapse has only been short (say no more than 3-6 months since the advertisement).
- If the position is in an isolated area, and attracting people to the location has traditionally proved difficult.
- If it has been historically difficult to attract people to the job type.

The Standards do not prevent an agency from advertising a job type on the basis that applicants considered suitable may be considered for appointment, when another vacancy for an identical job type arises, within a specified period. Caution needs to be exercised about the time period specified. An extended time period must be capable of being judged as reasonable. This will be dependent upon the type of job, the location and history about the likely source and ready availability of any new applicants, who could reasonably be considered suitable. Decisions about the advertising method must be transparent and capable of being judged as reasonable."

(Exhibit A10)

- The applicant thus argues that as Mr Stevens has met the requirements of the Circular and that his employment status should be converted from that of a contract basis to permanent status.
- 21 The respondent submits that the Arbitrator does not have jurisdiction to either issue the declaration or orders sought by the applicant given the requirements of s80E(7) of the Act. This section provides that the Arbitrator does not have jurisdiction to enquire into or deal with any matter in respect of a procedure referred to in s97(1)(a) of the PSM Act. As Mr Stevens is seeking appointment to a permanent position and the Standard applies to this process then the Arbitrator lacks jurisdiction to deal with this issue.
- 22 The respondent maintains that an employee converting to permanent status under the process outlined in the Circular is not a conversion to permanent status as argued by the applicant but is an appointment to a permanent position. As Mr Stevens is applying to be permanently appointed to a Level 2 position the Standard therefore applies. The respondent argues that as the order ultimately sought by the applicant is for Mr Stevens to be appointed to a permanent position then this can not be characterised as a conversion or confirmation of an existing appointment. The respondent relies on the decision of the Commission in Court session concerning Ms Buick in support of this contention (see *Civil Service Association of Western Australia Incorporated v Director General, Department of Justice* (2002) 82 WAIG 2480).
- 23 If the Arbitrator finds that there is jurisdiction to deal with this application the respondent argues that Mr Stevens should not be converted to permanent status given the requirements outlined in the Standard as the Circular is intended to comply with Public Sector Standards. The respondent argues that Mr Stevens did not gain his current Level 2 position through open competition nor on merit and therefore Mr Stevens' appointment was not consistent with the requirements of the Standard.
- 24 Open competition in the Circular is defined as follows:
- “(9) (b) Open competition: is met where the position was advertised as widely as appropriate and selection followed a merit-based assessment of skills, knowledge and abilities with the process being transparent and capable of review.”
- (Exhibit A1)
- 25 The respondent argues that the Level 2 Library Technician position should have been advertised externally as well as internally to meet the requirements of the definition of open competition in the Circular as well as the Standard to achieve the outcome of the most suitable and available person being selected. The respondent maintains that when Mr Stevens applied for the Level 2 position by way of an expression of interest in June 2002 this position was not advertised as widely as appropriate. This process was only used at the time to fill the Level 2 position on a short term basis, and in this instance a competitive field of applicants was not achieved.
- 26 The respondent argues that Mr Stevens was not selected on merit for his current position. When Mr Stevens commenced employment with the respondent on a casual basis and when he expressed interest in the Level 2 position in June 2002 he was not selected for this position on merit, therefore there has not been an assessment of Mr Stevens' knowledge and abilities compared to other possible applicants. The Standard requires that a position is advertised in such a way that the process is open and that a proper assessment of each applicant's skills and abilities takes place. The Standard also requires that the most suitable person available at the time be selected and appointed to a permanent position.
- 27 As the process whereby Mr Stevens has reached his current position does not comply with the Standard the respondent maintains that any order that issues would be inconsistent with the requirements of the Standard and therefore inconsistent with the Circular.

## **Findings and Conclusions**

### **Jurisdiction**

- 28 The respondent argues that the Arbitrator has no jurisdiction to deal with this application as s80E(7) of the Act prevents the Arbitrator from dealing with any matter referred to in s97(1)(a) of the PSM Act and that any breach of the Standard is to be dealt with by the Commissioner for Public Sector Standards and not the Arbitrator. Section 80E(7) of the Act reads as follows:

“(7) Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act.”

Section 97(1)(a) of the PSM Act reads as follows:

“(1) The functions of the Commissioner under this Part are —

- (a) to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards;”

The applicant maintains the Arbitrator has jurisdiction to deal with this application as the confirmation of a person to permanent status is not the same as a person being appointed to a permanent position and therefore the Standard does not apply.

- 29 The Circular refers to the ability of fixed term contract employees who are current public sector employees to convert to permanent officer status and thus be confirmed as having indefinite tenure, as long as the criteria outlined in the Circular are satisfied. The Circular also refers to the employee not undertaking work that is project based or is for a finite duration and that the employee is expected to occupy a position which is ongoing.

- 30 Under the heading Policy, the Circular provides that “ongoing positions in the public sector should not be filled by fixed term contract employees [and] a framework was developed to facilitate a change in status of fixed term contract employees where this is feasible and appropriate.” Under the heading Background, paragraph two reads as follows:

“The use of fixed term contracts of employment is provided for in most employment situations. The Government’s policy is for such arrangements to be restricted to the Senior Executive Service as detailed in the *Public Sector Management Act 1994* and those circumstances where a position is genuinely not of an ongoing nature and/or is subject to limitations associated with external funding.”

and further, paragraph 3 reads:

“The framework attached to this Circular is designed to deal with the resolution of fixed term contract arrangements while satisfying all legislative requirements and the Public Sector Standards in Human Resource Management.”

(Exhibit A1)

- 31 Under Introduction the policy provides for:

“(1) This arrangement is put forward as a course of action to implement the Government’s policy platform in relation to the use of fixed term contract employment in the public sector.”

and

“2 The arrangement focuses on:

- (b) current public sector employees (not employed under *Part 3* of the *Public Sector Management Act 1994*) on fixed term contracts. It is proposed to confirm the indefinite tenure of public sector employees on fixed term contracts when the criteria set out below are satisfied.”

(Exhibit A1)

- 32 Under Confirmation Criteria the policy provides:

“(5) Subject to 4 (a) and (b) above, “confirmation” of indefinite tenure will be authorised for, and offered to, all current and future public sector employees employed on fixed term contracts who:

- (a) on or after the date of this Circular have been continuously employed on fixed term contract of service, continuously rolled over, at the same level performing substantially the same duties and by the same employing authority, for 12 months or more; and  
 (b) have during this period continuously occupied a position that was filled through open competition; and  
 (c) are not currently involved in documented action relating to sub-standard performance or disciplinary matters.”

(Exhibit A1)

- 33 Under Definitions the following applies:

“(9) (b) Open competition: is met where the position was advertised as widely as appropriate and selection followed a merit-based assessment of skills, knowledge and abilities with the process being transparent and capable of review.”

(Exhibit A1)

- 34 The Circular provides a process to convert the status of existing fixed term contract employees who hold on-going positions to that of permanent, indefinite employment as long as all legislative requirements and Public Sector Standards in Human Resource Management are satisfied.

- 35 There is no suggestion in this case that Mr Stevens was excluded from being converted on any other ground apart from not filling the requirements of the definition of open competition as outlined in the Circular and there was no dispute that Mr Stevens’s position was an ongoing position.

- 36 In this case Mr Stevens did not have to apply to be converted to permanent status. The respondent gave evidence confirming that once the Circular issued employees on a fixed term contract arrangement with the respondent were assessed individually at

the initiative of the respondent. The assessment reviewed the various criteria for conversion outlined in the Circular including whether the individual's position was ongoing, how each employee was appointed to his or her existing position and whether or not their appointment had been through a process that could be characterised as open competition which included being advertised external to the respondent. Once an assessment was made of each employee each staff member was advised of the respondent's determination. Those employees deemed to have satisfied the requirements of the Circular were advised that they had been appointed to their existing position on a permanent basis. Their existing terms and conditions of employment remained the same with the only difference being that the employee was now permanent in his or her existing position.

- 37 I am of the view that when reviewing the rationale, intent and end result of the process outlined in the Circular that the conversion of an employee to permanent status under the Circular is a different process to that of a permanent appointment being made under the requirements of the Standard. In my view the Circular expresses a clear intention to create a policy framework to convert long term contract employees who hold ongoing positions to permanent status if certain requirements are met whereas the Standard deals with a situation where a person applies for and is selected from a number of candidates for a permanent position within the Public Sector. Once an employee applies for a position an assessment of the candidate's skills, knowledge and abilities in relation to the requirements of the job are considered. I am not aware of any provision within the PSM Act which provides for a standard which deals with the conversion of a fixed term employee to permanent status. In my view the Circular was designed for a different set of circumstances to the processes outlined under the Standard. The Circular refers to the framework being designed to deal with the resolution of fixed term contract arrangements whilst taking into account all legislative requirements and the Public Sector Standards in Human Resource Management. The Standard clearly relates to an appointment resulting from recruitment and selection within a competitive environment as opposed to the conversion of an existing employee to a different status. It is thus my view that the Standard deals with different considerations from that dealt with in the Circular. It follows and I find that the Standard does not apply to Mr Stevens' conversion to permanent status.
- 38 In all of the circumstances I am therefore of the view that the existence of the Standard creates no impediment to the Arbitrator's jurisdiction to deal with this application.
- 39 I note that the relationship between the Standard and the Circular was not canvassed in any detail before the Commission in Court session in the Buick case (*Civil Service Association of Western Australia Incorporated v Director General, Department of Justice* (op cit)). As the Commission in Court Session did not hear submissions from the parties in relation to this matter or make specific findings relating to whether or not the Standard applied to Ms Buick's employment, it is my view that I am not bound by this decision. It is also the case that this decision makes reference to the Circular not addressing the circumstances of the filling of permanent positions but instead refers to the Circular addressing the circumstances of long term (entry level) public sector contract officers (paragraph 39).

#### Merit

- 40 The respondent argues that even if the Arbitrator has jurisdiction to deal with this matter, Mr Stevens did not satisfy the Circular's requirement that he be appointed through open competition and that Mr Stevens was appointed to his position in a manner inconsistent with the Standard. The Standard requires that there be a proper assessment of a candidate's skills, knowledge and abilities and an appointment is to be made using an open and competitive process. This is qualified in the Circular by open competition being met when the person occupying the position which he or she is seeking conversion into is advertised as widely as appropriate and selection follows a merit based assessment of skills, knowledge and abilities.
- 41 In this instance, I am required to assess whether Mr Stevens gained his Level 2 position after it was advertised as widely as appropriate and whether Mr Stevens was appointed following a merit based assessment of his skills, knowledge and abilities sufficient to satisfy the requirements of the Standard.
- 42 In the definition of open competition the Circular does not specify what is meant by a position being advertised "as widely as appropriate", nor is there any set criteria confirming what this means. Even though Mr Stevens was the only person to express interest in the Level 2 position in June 2002 I find that in the circumstances his appointment to the Level 2 position was advertised as widely as appropriate in the circumstances even though the Level 2 position was not advertised external to the respondent's operations. The expression of interest process that Mr Stevens responded to was advertised within the respondent's operations. I accept Mr Stevens' evidence that the respondent has a number of different campuses employing approximately 17 Level 2 Library Technicians and Level 1 Library Assistants. Ms Corless gave evidence that of the respondent's 2,000 employees there are between 20 to 40 Level 1 employees working in the respondent's Learning Resource Centres and at front counters and approximately 40 to 60 employees working in Level 2 positions in the respondent's administration roles and Learning Resource Centres. Even though the expressions of interest for the Level 2 position were limited to the respondent's intranet advertising, as the number of persons within the respondent's operations who could have applied for this position was a reasonably large group of employees it is my view that the criteria of the Level 2 position being advertised as widely as appropriate was satisfied. In reaching this view I also take into account that some of the respondent's existing permanent Level 2 employees may not have wanted to apply for this position. If I am wrong in reaching this conclusion in my view it is appropriate to take into account that Mr Stevens was interviewed for the same Level 2 position in May 2002, after this position was advertised both internally and external to the College. It was not in contest that even though Mr Stevens was unsuccessful in gaining the Level 2 position at the time he was told by his supervisor that he had been highly competitive for the position and that he only just missed out on being appointed to the position. I conclude from this that at this point Mr Stevens' skills and abilities were assessed at being at least adequate for undertaking the Level 2 position after the Level 2 position had been advertised both internally and external to the respondent's operations. Further, Mr Stevens was advised that if a second Level 2 permanent position was available at the time Mr Stevens would have been appointed to that position. In my view it was open for the respondent to take into account that Mr Stevens was interviewed and close to being selected for a permanent Level 2 Library Technician position soon after it was widely advertised both internally and external to the College. I also note the advice on the Office of the Public Sector Standards Commissioner's website which states that a previous selection process can be taken into account when appointing an employee to an identical position which becomes vacant soon after the original selection process.
- 43 I find that Mr Stevens has satisfied the requirement that he be selected on merit for his existing position sufficient to satisfy the requirements of both the Circular and the Standard. I have already found that when Mr Stevens applied for and was interviewed for the Level 2 position in May 2002 he was competitive for this position compared to other applicants. I accept that Mr Stevens was assessed as being suitable for the Level 2 Library Technician position in May 2002 even though he was not appointed to this position. It is also the case that there was no issue with Mr Stevens' ability to undertake the requirements of the Level 2 position. I also take into account that the expression of interest advertisement for the Level 2 Library Technician position required that the same duties and expectations as the position that Mr Stevens applied for in April 2002 be carried out by the successful candidate, as the duties required of the Level 2 position on the expression of interest document

(Exhibit A5) are identical to the duties contained in the advertisement for the permanent Level 2 position advertised in April 2002 (Exhibit A4). Even though there is reference in the expression of interest document that selection to a position may not be made on merit no evidence was given by the respondent that Mr Stevens was not selected on merit. Even though Mr Stevens was the only applicant for this position this does not necessarily mean that he was not meritorious for this position. It is clear that Mr Stevens' skills were assessed when he was interviewed for the permanent Level 2 position in May 2002 and that when Mr Stevens applied for the Level 2 position via an expression of interest application in June 2002 the respondent clearly had confidence in Mr Stevens' ability to undertake the requirements of the Level 2 position. I therefore conclude that Mr Stevens' was selected for his existing Level 2 position on merit.

- 44 It is my view that Mr Stevens should have been converted to permanent status as he was properly assessed for the Level 2 position through an open, competitive and transparent process. I therefore conclude that Mr Stevens satisfies the Circular's requirements in relation to the definition of "open competition" and I propose to order that he be converted to permanent status. Having reached these conclusions I find that there is no inconsistency between the Circular and the requirements contained in the Standard.
- 45 A Minute of Proposed Order will now issue.

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**2004 WAIRC 10901**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>APPLICANT</b>
	-v-	
	GOVERNING COUNCIL OF CENTRAL TAFE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON PUBLIC SERVICE ARBITRATOR	
<b>DATE OF ORDER</b>	WEDNESDAY, 17 MARCH 2004	
<b>FILE NO/S</b>	PSACR 31 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10901	

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**Result**                      Jurisdiction found. Order issued

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*Order*

HAVING HEARD Mr J Ross on behalf of the applicant and Mr P Wishart and with him Mr D Matthews of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

- 1        DECLARES THAT Mr Lewis Stevens satisfies the criteria for conversion to permanency as outlined in the Premier's Circular No 17 of 2002.
- 2        ORDERS that the respondent convert Mr Lewis Stevens' employment status from contract to permanent.

(Sgd.) J L HARRISON,  
Commissioner,  
Public Service Arbitrator.

[L.S.]

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**2004 WAIRC 10978**

**CONVERSION TO PERMANENCY**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>APPLICANT</b>
	-v-	
	DIRECTOR GENERAL, DEPARTMENT OF CULTURE AND THE ARTS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR	
<b>DATE OF ORDER</b>	FRIDAY, 26 MARCH 2004	
<b>FILE NO</b>	PSAC 66 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10978	

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**Result**                      Interim Order Rescinded

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*Order*

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the Industrial Relations Act 1979; and WHEREAS on the 6<sup>th</sup> day of February 2004, the Public Service Arbitrator ("the Arbitrator") issued an interim order in respect of this matter; and

WHEREAS on the 25<sup>th</sup> day of March 2004, the Arbitrator convened a conference for the purpose of dealing with interlocutory matters; and

WHEREAS at the conference the respondent requested that the interim order be rescinded and the applicant consented to such rescission on particular grounds;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers in the Industrial Relations Act 1979, hereby orders:

THAT the interim order issued on the 6<sup>th</sup> day of February 2004 be, and is hereby rescinded.

(Sgd.) P E SCOTT,  
Commissioner,  
Public Service Arbitrator.

[L.S.]

**2004 WAIRC 11019**

**BANS ON PERFORMANCE OF MARINE SAFETY DUTIES**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE EXECUTIVE DIRECTOR, DEPARTMENT OF FISHERIES

**APPLICANT**

**-v-**

THE GENERAL SECRETARY, CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA  
INCORPORATED

**RESPONDENT**

**CORAM**

COMMISSIONER P E SCOTT  
PUBLIC SERVICE ARBITRATOR

**DATE OF ORDER**

THURSDAY, 1 APRIL 2004

**FILE NO**

PSAC 1 OF 2004

**CITATION NO.**

2004 WAIRC 11019

**Result**

Consent order issued

*Order*

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS the parties were in dispute over the method and outcome of the applicant's review into the classification and structure of Fisheries and Marine Officers and Compliance Manager positions; and

WHEREAS on the 9<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> days of January 2004 and the 2<sup>nd</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup> and 17<sup>th</sup> days of February 2004, and the 8<sup>th</sup> day of March 2004, the Public Service Arbitrator convened conferences for the purpose of conciliation between the parties; and

WHEREAS at the conclusion of the latter conference, the parties reached agreement in settlement of the dispute and requested that an order be issued to reflect that agreement;

NOW THEREFORE, the Public Service Arbitrator pursuant to the powers conferred on by the Industrial Relations Act 1979, and by consent, hereby orders:

THAT the arrangement agreed between the parties in respect of the classification structure and classifications for the positions of Fisheries and Marine Officers and Compliance Manager within the applicant's operations shall be implemented in accordance with the terms set out in the schedule attached hereto.

(Sgd.) P E SCOTT,  
Commissioner,  
Public Service Arbitrator.

[L.S.]

**SCHEDULE**

1. Trainee Fisheries and Marine Officer positions shall be reclassified to Level 2 with effect from 16 January 2004, with a new increment date of 16 January 2004. Future movement to Level 3 shall be by reclassification in accordance with the classification criteria that are being developed.
2. Fisheries and Marine Officers at Level 2 increments 1, 2 and 3 shall advance one increment effective 16 January 2004 but shall retain their current increment date for the purpose of future increments. Future movement to Level 3 shall be by reclassification in accordance with classification criteria that are being developed.
3. Fisheries and Marine Officers at Level 2 increments 4 and 5 shall be reclassified to Level 3 with effect from 16 January 2004, with a new increment date of 16 January 2004. Staff reclassified through this process shall meet the requirements of the Level 3 classification criteria within 18 months.
4. District Fisheries and Marine Officer positions at Albany, Broome, Busselton, Mandurah, Metropolitan (2), Geraldton and Denham shall be classified Level 4 effective 16 January 2004.
5. District Fisheries and Marine Officer positions at Bunbury, Carnarvon, Exmouth, Esperance, Rockingham, Lancelin, Jurien, Dongara, Karratha and two Mobile Patrol positions shall be subject to review by Mr Keith Dodd. The parties shall accept the outcome of that review. Any classification increase recommended by Mr Dodd shall be effective from 16 January 2004.
6. All Level 4 District Fisheries and Marine Officer positions shall be filled through advertisement and/or by transfer of staff at their substantive level. Until such time as permanent appointments are made the positions shall be offered to current acting or substantive Level 3 District Fisheries and Marine Officers in those locations on an acting basis with the payment of a higher duties allowance. A recruitment process for appointment to a pool from which Level 4 positions shall be

filled shall commence on the basis that appointments to positions shall not be made until the number of Level 4 positions to be filled is known at the conclusion of the review by Mr Dodd.

7. Compliance Manager positions shall be classified at Level 6 under the Public Service Award 1992 and Public Service General Agreement 2002. These positions shall not be classified as Fisheries Officers for the purposes of the Department of Fisheries Agency Specific Agreement 2003. These positions shall be filled through advertisement and the recruitment process can now be commenced. Until such time as ongoing appointments are made the positions shall be offered to current acting or substantive Level 4 Supervising Fisheries and Marine Officers on an acting basis. Staff appointed to these positions who were previously paid at Level 4 increment 3 under the Agency Specific Agreement shall commence at Level 6 increment 2 to ensure that they do not suffer a reduction in total salary.
8. Review of other Fisheries and Marine Officer positions (Serious Offences Unit, Patrol Vessels and Central Support Unit) shall be completed as quickly as possible, with a view to finalising the review by the end of March 2004. Positions for which the classification is disputed shall be subject to review by Mr Dodd. The parties shall accept the outcome of that review. Any classification increase recommended by Mr Dodd shall be effective from 16 January 2004.
9. Notwithstanding the outcome of the review by Mr Dodd, Fisheries and Marine Officers shall retain their rights pursuant to s 80E(2)(a) of the Industrial Relations Act 1979.
10. Decisions on appointment to positions shall attempt to balance the needs of the Department with those of individual staff including minimising the number of staff movements between locations.
11. The respondent shall permanently remove work bans imposed in relation to this matter.

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**2004 WAIRC 10981**

**DISPUTE RE: CONVERSION OF MEMBER FROM FIXED TERM CONTRACTS  
TO PERMANENCY**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>APPLICANT</b>
	-v- DIRECTOR GENERAL, DEPARTMENT OF HEALTH	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR	
<b>DATE OF ORDER</b>	FRIDAY, 26 MARCH 2004	
<b>FILE NO</b>	PSACR 67 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10981	

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**Result**                      Application Dismissed

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*Order*

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the Industrial Relations Act 1979; and  
 WHEREAS this matter was listed for hearing and determination on the 24<sup>th</sup> and 25<sup>th</sup> days of February 2004; and  
 WHEREAS on the 23<sup>rd</sup> day of February 2004, the Applicant requested that the matter be adjourned and such adjournment was granted; and  
 WHEREAS also on the 23<sup>rd</sup> day of February 2004, the Applicant sought time to consider its position in respect of the matter; and  
 WHEREAS on the 22<sup>nd</sup> day of March 2004, the Applicant filed a Notice of Discontinuance in respect of the matter and the respondent consented to the matter being discontinued;  
 NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this matter be, and is hereby dismissed.

(Sgd.) P E SCOTT,  
Commissioner,  
Public Service Arbitrator.

[L.S.]

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**2004 WAIRC 10908**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>APPLICANT</b>
	-v- DIRECTOR GENERAL, DEPARTMENT OF HEALTH	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	THURSDAY, 18 MARCH 2004	
<b>FILE NO</b>	PSAC 10 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 10908	

<b>Result</b>	Order issued.
<b>Representation</b>	
<b>Applicant</b>	Mr O.J. Wood
<b>Respondent</b>	Mr G. Edwards

*Order*

WHEREAS an application was lodged in the Commission pursuant to s.44 of the *Industrial Relations Act 1979* concerning the claim of the union that a dispute exists concerning the terms of employment of Ms Mujakic following the alleged failure of the Department to implement the terms of the Settlement in a Deed of Release made between the Director General of Health and Ms Mujakic in settlement of PSAC27 of 2003;

AND WHEREAS on 17 March 2004 a conference between the parties was held at which the Department informed the Public Service Arbitrator that the Department had not implemented the terms of the Settlement within the 21 days stipulated in the Deed of Release;

AND WHEREAS the Public Service Arbitrator is of the opinion that an order is necessary to prevent the deterioration of industrial relations between the parties until conciliation has resolved that matter and to encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s.44 of the *Industrial Relations Act 1979*, hereby order -

- (1) THAT within 10 days of the date of this order the Department of Health provide in writing to the union, with a copy to the Commission, the explanation for the delayed implementation of paragraphs 1, 2, 4 and 5 of the Settlement in the Deed of Release made between the Director General of Health and Ms Mujakic.
- (2) THAT within 10 days of the date of this order the Department of Health provide in writing to the union, with a copy to the Commission, of the steps it has taken in relation to paragraph 6 of the Settlement in the Deed of Release made between the Director General of Health and Ms Mujakic.
- (3) THAT in relation to paragraph 3 of the Settlement in the Deed of Release made between the Director General of Health and Ms Mujakic, the letter from Mr Edwards of 9 March 2004 is amended by deleting the requirement for Ms Mujakic to report for duty on Thursday, 11 March 2004.
- (4) THAT within 14 days from the date of this order, the union and the Department of Health are to discuss and clarify the terms of the placement at Royal Perth Hospital that is contained within the letter from Mr Edwards of 9 March 2004 and upon that clarification agree on the date that Ms Mujakic will report for duty taking into account her present medical certificate, provided that in the event that there is no agreement on any matter, that the parties report back to the Commission at the expiry of the 14 days.
- (5) THAT the Department of Health maintain all salary, benefits and entitlements of Ms Mujakic until further order.
- (6) THAT in the event there are other options open to the parties, including an alternate placement, the options be discussed between the Department of Health and the union consistent with Order (4) of this order.
- (7) THAT either party may apply to vary or cancel this order upon giving 48 hours' notice.

[L.S.]

(Sgd.) A R BEECH,  
Senior Commissioner.

**2004 WAIRC 11002**

**EMPLOYEE DENIED ENTITLEMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

DIRECTOR GENERAL DEPARTMENT OF HOUSING AND WORKS

**RESPONDENT**

**CORAM**

COMMISSIONER P E SCOTT  
PUBLIC SERVICE ARBITRATOR

**DATE**

WEDNESDAY, 31 MARCH 2004

**FILE NO**

PSACR 45 OF 2003

**CITATION NO.**

2004 WAIRC 11002

**Catchwords**

Employee denied entitlements – Jurisdiction of the Public Service Arbitrator – Whether counsel for the respondent be granted leave to appear – Relevant principles to be applied – Questions of law have been raised – Counsel granted leave to appear – *Industrial Relations Act 1979* (WA) s 31(4)

**Result**

Counsel granted leave to appear

**Representation**

**Applicant**

Mr M Amati

**Respondent**

Mr R Andretich (of counsel)

*Reasons for Decision*

- 1 The Public Service Arbitrator has referred for hearing and determination the following issue:
- “1. The Civil Service Association of Western Australia Incorporated (“the Applicant”) says that:
- (a) its member, Mr Clive Cass, was employed by the Director General, Department of Housing and Works (“the Respondent”) as a Level 3 Accommodation Manager for 10 years;
  - (b) on 17 June 2002 the Respondent commenced a disciplinary process against Mr Cass on the basis of a complaint from a client;
  - (c) on 13 June 2002 the Regional Manager verbally directed Mr Cass to take leave;
  - (d) Mr Cass was denied any record of the complaint made to the Respondent by the client as well as any copies of minutes regarding the meetings with the Regional Manager;
  - (e) the internal investigation was postponed after a meeting between the parties on 21 June 2002 where it was agreed that it was inappropriate to pursue an internal investigation while criminal proceedings were pending;
  - (f) on 19 July 2002 the Respondent wrote to Mr Cass directing that Mr Cass remain home on leave pending the outcome of both the criminal proceedings and the Respondent’s internal disciplinary procedures;
  - (g) Mr Cass remained home on leave until his full entitlement of annual leave and long service leave had expired. The Respondent then made arrangements for a return to work in an alternative position on 5 October 2002;
  - (h) Mr Cass resigned with effect from 5 September 2003;
  - (i) the complaint against Mr Cass was also the subject of criminal charges. On 8 September 2003 Mr Cass pleaded guilty to the charges; and
  - (j) the Respondent rejected a claim by Mr Cass for travel allowance to be paid to him as prescribed by the Public Service Award 1992.
2. The Applicant further says that the decision to unilaterally deduct annual leave and long service leave from Mr Cass’s accrued entitlement between Thursday 13 June 2002 and 5 October 2002 was harsh, oppressive and unfair, effectively applied a penalty and the leave was not taken for its proper purpose.
3. The Applicant seeks an order that:
- (a) the annual leave and long service leave utilized for the period Mr Cass was directed to remain home be reinstated; and
  - (b) the claims for travel assistance be processed consistent with other members of staff when making application for this allowance.
4. The Respondent refutes the claims of the Applicant and denies that it has acted harshly, oppressively or unfairly towards Mr Cass and further says that:
- (a) Mr Cass did not respond to the Respondent’s enquiries under the disciplinary provisions of the Public Sector Management Act 1994 due to the pending criminal proceedings and issues regarding self-incrimination;
  - (b) the Respondent had no option other than to direct Mr Cass to proceed on leave due to the nature of his employment and the serious allegations against him. The Applicant effectively accepted this action, in that it only applied to the Public Service Arbitrator to have the matter reviewed when Mr Cass tendered his resignation some 15 months after the incident;
  - (c) when Mr Cass’s leave entitlements were exhausted, special arrangements were made for him to work at an alternate location so as not to impose financial hardship;
  - (d) had Mr Cass co-operated with the Respondent’s enquiries and admitted the allegations and charges earlier, his employment would have been terminated and he would have received the balance of his unused leave entitlements accordingly. This was effectively within Mr Cass’s control; and
  - (e) Mr Cass’s employment had been maintained through to September 2003 when he tendered his resignation; he effectively received the benefit of 11 months salary which he would not have otherwise received had he admitted the allegations when the matter first arose.
5. The Respondent denies that the Applicant is entitled to the relief sought or any relief at all.
6. The Respondent submits that any application for the reinstatement of annual leave and long service leave, and claims for the payment for travel assistance, are matters that should be progressed before the Industrial Magistrate.”
- 2 The applicant challenges the respondent’s representation by counsel and the issue was ventilated during a conference convened on Tuesday, 17 February 2004. At that conference, the Arbitrator gave an informal preliminary view that leave was likely to be granted to counsel to appear for the respondent in the circumstances of this matter as there were issues of jurisdiction and power of the Arbitrator which were necessary to be dealt with. The parties requested that the matter be formally dealt with and determined prior to the hearing of the substantive matter so that parties could properly prepare through their representatives. On 23 February 2004 the parties agreed to deal with the matter by way of written submissions. The respondent filed a written submission outlining the legal issues which it claims would be raised during the course of the hearing. The applicant responded with a submission received on 18 March 2004, notwithstanding that at the conference it had been agreed that the applicant would reply within 7 days of the respondent’s submission.
- 3 It is quite clear from the respondent’s submission that the respondent challenges the Arbitrator’s jurisdiction to deal with the matter on a number of bases including the claims constitute matters which ought be before the Industrial Magistrate rather than the Arbitrator. There is clearly also a challenge to whether the matter is appropriately dealt with on the basis of the parties’ legal rights and obligations, some of which are dealt with under the terms of the Minimum Conditions of Employment Act 1993. Another issue raised by the applicant is a question of the entitlement to payment of salary where no service is rendered and the legal rights arising in such circumstances. The respondent’s submission concludes by stating that “hence the restoration of leave by exercise of Arbitral function would in this way be unrelated to existing contract of employment and therefore not constitute an industrial matter”.

- 4 The applicant on the other hand says that the matter relates to questions of fact and not matters of law and that the respondent has misstated the application and what is required in its consideration. The applicant also says that the matter is consistent with the Arbitrator's imprimatur to deal with matters according to equity, fairness and good conscience and is consistent with the objects of the Industrial Relations Act 1979 ("the Act"). The applicant says that points raised by the respondent do not constitute questions of law and can be disposed of by the Arbitrator without recourse to such matters.
- 5 Section 31(4) of the Act provides that where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard.
- 6 In this case, I am satisfied that whilst the applicant says that issues of law are not necessary to be dealt with, the respondent is entitled to argue issues of law in this matter and they do arise. Those issues include the Arbitrator's jurisdiction which is clearly a question of law. This is not a matter which relies solely on the merits of the case. Whether ultimately the issues of law raised by the respondent are sustained is a matter for determination at a later date. I find that the issues of law on which the respondent relies will be raised and require consideration. Therefore, I am prepared to allow counsel to appear in this matter.

2004 WAIRC 10979

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>APPLICANT</b>
	-v-	
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
	PUBLIC SERVICE ARBITRATOR	
<b>DATE OF ORDER</b>	FRIDAY, 26 MARCH 2004	
<b>FILE NO</b>	PSAC 51 OF 2002	
<b>CITATION NO.</b>	2004 WAIRC 10979	

<b>Catchwords</b>	Jurisdiction of Public Service Arbitrator – Whether order sought falls within ambit of a Public Sector Standard – Arbitrator held to have jurisdiction – Application not in relation to a breach of a Public Sector Standard – <i>Industrial Relations Act 1979</i> (WA) s 80E(1) s 80E(5) s 80E(7); <i>Public Sector Management Act 1994</i> (WA) s 97(1)(a)
<b>Result</b>	Jurisdiction found.
<b>Representation</b>	
<b>Applicant</b>	Mr J Dasey
<b>Respondent</b>	Mr R Andretich (of counsel)

#### *Reasons for Decision*

- 1 On 17 December 2002 the applicant applied to the Public Service Arbitrator ("the Arbitrator") seeking an urgent conference pursuant to s44 and s80E of the *Industrial Relations Act 1979* ("the Act") with the Director General, Department of Justice ("the respondent") in relation to a dispute involving the non-appointment of Mr Neville Jones to a Level 7 Principal Policy Officer position with the respondent. A conference was held on 24 January 2003 and as the matter was not settled by conciliation the matter was referred for hearing and determination. The respondent raised a preliminary issue of the Arbitrator's jurisdiction to deal with this matter and it was decided that this issue would be dealt with before the substantive matter was heard.
- 2 On 10 January 2003 the applicant wrote to the Commission seeking leave to amend Schedule A of its application. A number of grounds and particulars were included in the amended schedule and the following orders were sought:

#### **“Urgent Interim Orders Sought**

The applicant seeks the following interim order to prevent this application from potentially becoming nugatory:

1. The respondent shall not in any way alter, abolish, relocate, restructure, make redundant, diminish or declassify or permanently allocate to another person, the position and duties of Principal Policy Officer level 7, (position number P001035), and shall maintain adequate money in its budget to fund this position, at least until final orders are issued in the determination of this matter.

#### **Final Orders Sought**

The applicant seeks the following final orders:

1. The actions of the Director General, relating to the construction and forwarding of his memorandum dated 23 October 2002, concerning Mr Neville Jones, and the instructions to officers contained therein, are hereby void ab initio.
2. The actions of the Executive Director, selection panel members, human resource officers and any other officer, in direct response to the Director General's memorandum dated 23 October 2002, relating to Mr Jones, are hereby void ab initio.
3. Within 7 calendar days of the date of the issuing of this Order, the respondent is to complete the implementation of Mr Jones' promotion to the position of Principal Policy Officer level 7, (position number P001035), so that Mr Jones is substantively confirmed in the position with effect from the date on which the position was advertised. Mr Jones is to be permitted to perform all of the position's duties and is to receive all benefits, entitlements,

privileges, powers, authority, responsibility, amenities and status which should reasonably accompany the position.

4. Within 7 calendar days of the date of this Order, the Director General himself, is to successfully send by e-mail, a copy of these Orders and accompanying Reasons for Decision, to all staff with email facilities within the respondent's employ. No derogatory comments about Mr Jones are to be contained in the email, or in any other written communications to staff. The email is to also request staff with email facilities, to forward the information to staff without email facilities."
- 3 However prior to this application progressing any further Mr Jones sought leave to intervene on his own behalf in this application and an application was lodged to join Application 102 of 2003, which was a claim by Mr Jones that he has been denied a benefit due to him under his contract of employment, to this matter. These issues were dealt with by the Commission as presently constituted and separate reasons issued in relation to these issues.
- 4 Prior to the hearing on the issue of jurisdiction the parties agreed on a statement of facts as follows:

"Agreed Statement of facts for purposes of jurisdiction hearing in PSAC 51 of 2002

1. The Applicant's member Mr Neville Jones is a permanent level 6 Public Service Officer with over 20 years service with the Respondent.
2. Mr Jones applied for a Level 7 vacancy in position 001035 Principal Policy Officer ("the position").
3. The selection panel interviewed Mr Jones on 10 September 2002 and subsequently assessed Mr Jones as the recommended applicant. On 26 September 2002 such a recommendation was forwarded to the Executive Director, who had delegated authority to appoint an officer to fill the subject vacancy.
4. The Executive Director endorsed the recommendation on 7 October 2002.
5. On 11 October Mr Jones was advised through letter (sic) from a Recruitment Officer that he had been recommended for appointment. (Letter No1).
6. On Thursday 24 October Mr Jones was advised by the Chairperson of the selection pane, (sic) Mr Bill Cullen that the Director General, Mr Alan Piper had sent Mr Cullen a memo raising concern over Mr Jones (sic) overall performance and requesting Mr Cullen to obtain reports from specific people.
7. The Director General's memo, dated 23 October 2002, required Mr Cullen to consider the referee reports and consult with the Manager Human Resources, before advising Mr Piper of Mr Cullen's recommendation regarding Mr Jones' suitability for the position. (Letter No 2)
8. The appointment of Mr Jones did not proceed.
9. On 5 December Mr Jones received a letter from the Director Human Resources stating that notwithstanding the letter of 11 October the position would not be filled and that as a result of referee reports which had been received the Executive Director felt that Mr Jones was unable to meet the requirement's (sic) of the vital aspects of the essential criteria. (Letter No 3)"

(Exhibit A1)

- 5 Attached to the agreed facts (Exhibit A1) were three letters as follows, formal parts omitted:

**"P001035, PRINCIPAL POLICY OFFICER, LEVEL 7, POLICY, PLANNING & RESEARCH, CJJ DIVISION**

I am pleased to advise that you have been recommended for appointment to the above position.

Applicants not recommended may lodge a formal application for a review if they are of the opinion that there has been a breach of standard relating to the recruitment, selection and appointment process. The period allowed to lodge a formal application for review closes 5.00pm 24 October 2002.

In view of the requirement to offer unsuccessful applicants the opportunity for review you will appreciate your appointment is not yet assured. I will advise you further in due course."

(Exhibit A1, Letter 1)

"Re: Principal Policy Officer (Position No 001035) - Recruitment, Selection and Appointment Process

Routinely I am advised of senior appointments within the Division. As such I have recently been advised of the recommended appointment of Mr Neville Jones to the position of Principal Policy Officer within the Community and Juvenile Justice Division.

It has previously come to my attention that there are some concerns in regard to Mr Jones' skills and abilities as per the following:

- Deficiency in his ability to engage and consult with stakeholders when developing policies/strategies.
- Deficiency in his ability to develop policies/strategies that meet the needs of the business area.
- Deficiency in his ability to complete projects satisfactorily.
- Deficiency in his ability to play a leadership role within the Department.
- Lacks the confidence of his colleagues to represent the Department at senior decision-making forums.

I have been informed that referee reports were not sought by the panel to clarify Mr Jones' suitability for the position. Although, I recognise that this is not a mandatory requirement, given the concerns I have outlined above, I request that the panel seek written referee reports from the following personnel:

- Mr Gary Thompson, Executive Director, Courts
- Mr Stephen Kay, Director Court Development
- Mr Alan Thompson (Referee nominated by Mr Jones)
- Dr Bob Fitzgerald (Referee nominated by Mr Jones).

I have sought advice from the Human Resources Directorate, which has prepared the attached referee report to be completed by the referees. Based on the outcome of these referee reports and in consultation with Mr Terry Bransby, Manager HR (CJJ), I wish to be advised of your recommendation regarding Mr Jones' suitability for the position before any such appointment is confirmed."

(Exhibit A1, Letter 2)

**“P001035, PRINCIPAL POLICY OFFICER, LEVEL 7, POLICY & PLANNING, CJJ DIVISION**

Notwithstanding the letter of recommendation to the position of Principal Policy Officer P001035, dated 11 October 2002, we regret to advise a decision has been made not to proceed in filling this vacancy.

In conjunction with your application and interview, your nominated referees, plus two Departmental referees were contacted. Referee reports provided by Mr Thompson and Dr Kay indicate there are issues around your appointment to this position. Drawing from this information Mr Harvey feels that you are unable to meet the requirements of the vital aspects of the essential criteria.

Also, Mr Harvey is currently looking at the organisational structure within Policy and Planning and is seriously considering abolishing this position, as he believes the structure is ‘top heavy’ and more resources need to be directed to lower level policy positions.

Appointments in the public sector are subject to the provisions of the Public Sector Management (Examination and Review Procedures) Regulations 2001. Accordingly, as an applicant, it is open to you to make application for a review of this process, if you are of the opinion that the Recruitment, Selection and Appointment Standard (see reverse of page 2) has been breached.

In lodging your claim, specify which part of the Standard you believe has been breached and why, along with a brief explanation as to how the outcome of the selection process has adversely affected you.

Your claim must be received by this office by 5.00pm, 19 December 2002. Claims cannot be accepted after this date. Your claim should be forwarded either by email to [humanres@justice.wa.gov.au](mailto:humanres@justice.wa.gov.au), fax to (08) 9264 1273, post to The Recruitment Officer, GPO Box F317, Perth WA 6841, or hand delivered to the Human Resources Directorate, 11<sup>th</sup> Floor, 141 St George’s Terrace, Perth.”

(Exhibit A1, Letter 3)

Respondent’s Submissions

- 6 The respondent does not take issue with Mr Jones having applied for the Level 7 position and being recommended for appointment to this position by the selection panel established by the respondent for filling the Level 7 position. Even though Mr Jones was advised by letter on 11 October 2002 that he was to be recommended for appointment to the Level 7 position, the respondent maintains that this letter did not constitute notification that Mr Jones was in fact appointed to the Level 7 position. The respondent maintains that the letter gives advice to Mr Jones that he was recommended for appointment to the Level 7 position and it did not constitute an offer of promotion to this position (Exhibit A1, Letter 1). The respondent maintains that the applicant did not regard the letter of 11 October 2002 to Mr Jones as an offer of appointment, nor does the applicant maintain that such an offer was accepted by Mr Jones. If that was the case then it would be open for Mr Jones to argue that he had been constructively dismissed by not being allowed to take up the appointment referred to in this letter. The respondent argues that the letter sent to Mr Jones on 11 October 2002 did nothing more than advise Mr Jones that he had been recommended for appointment following a selection process. The respondent maintains that there is no statutory or common law obligation imposed upon an employing authority to implement the outcomes of a selection process and relies on *McGarrigle v Public Service Board* [1979] 1 NSWLR 292 at p301 in support of its argument.
- 7 The respondent acknowledges that it did not appoint Mr Jones to the Level 7 position following his recommendation for appointment to this position by the selection panel following the involvement of the respondent’s Director General, Mr Piper. The respondent argues that it was open to Mr Piper to become involved in the process of appointing a person to this Level 7 position. Even though the respondent’s Executive Director, Mr Harvey was delegated by the Director General to appoint a person to the Level 7 position, s59(1) of the *Interpretation Act 1984* does not preclude a person who delegates any power or duty from becoming involved or exercising or performing at any time a power or duty so delegated. It was therefore open to the respondent at any time before Mr Jones accepted an unequivocal offer of appointment to refuse to appoint him.
- 8 The respondent maintains that what has occurred in this instance can only be characterised as a refusal to appoint Mr Jones to the Level 7 position following his recommendation for appointment by the selection panel.
- 9 The respondent relies on s80E(7) of the Act which excludes from the Arbitrator’s jurisdiction any matter in respect of which a procedure referred to in s97(1)(a) of the *Public Sector Management Act 1994* (“the PSM Act”) is or may be prescribed under that act. This section of the PSM Act provides for the making of regulations to enable employees and other persons to obtain relief in respect of breaches of public sector standards. The Public Sector Management (Examination and Review Procedures) Regulations 2001, made under section 97(1)(a) specifically provide at Regulation 5(2)(a) for a person to lodge a claim where the person considers that a public sector body is in breach of the Recruitment, Selection and Appointment Standard in relation to a decision made or action taken:
  - “(i) to appoint or not appoint a person to fill a vacancy; or
  - (ii) to select or not select a person to form part of an appointment pool;”

where that person is adversely affected by that decision or action.

As this standard is in place and given that Mr Jones’ complaint falls within its ambit then the Arbitrator is excluded from dealing with this issue given the terms of s80E(7) of the Act.

- 10 The respondent also maintains that where there has been a statutory illegality not an unlawful administrative act as argued by the applicant then s80E(7) of the Act and s97(1)(a) of the PSM Act are excluded from applying.

Applicant’s submissions

- 11 The applicant maintains that there is no question that Mr Jones is a government officer or that the application was properly commenced by a registered organisation under s80F of the Act in relation to an industrial matter. The applicant seeks to have the Arbitrator exercise its specific power under s80E(5) of the Act to nullify the actions taken by the respondent in relation to a government officer.
- 12 The applicant submits that as this application does not come within the ambit of any public sector standard the Arbitrator is therefore not excluded by the operation of s80E(7) of the Act and s97(1)(a) of the PSM Act from dealing with this application. The applicant maintains that even though this issue is about the failure to appoint a government officer to a position it does not involve the normal events relating to the Recruitment, Selection and Appointment Standard. If it did so, the applicant concedes that the issue would be a matter that does not attract the Arbitrator’s jurisdiction. Rather, the applicant argues this claim concerns the unlawful interference by the Director General, Mr Piper in Mr Jones’ appointment to the Level 7 position after the selection process was completed.

- 13 This application seeks to have the Arbitrator enquire into the Director General's actions in what the applicant claims was an improper and unlawful interference in the selection process for this Level 7 position. The applicant argues that if it was not for the actions of the Director General, then Mr Jones would have been appointed to the Level 7 position.
- 14 The applicant maintains that when the Director General became involved in the selection process this constituted an exercise of administrative power in a manner contrary to the principles of administrative law. The relief sought by the applicant is to have this unlawful exercise of power declared void and for the selection and appointment process to proceed as it would have, had the unlawful action not occurred. The applicant maintains as decisions made by the Director General of a public sector organisation in relation to employees constitute an exercise of power derived from the PSM Act the principles of administrative law therefore apply. The applicant relies on the *Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA* [2002] 82 WAIG 2982 at p2983 in support of its argument. In this case Kenner C stated:
- "I accept the broad proposition advanced by the applicant that public sector and private sector employment is different, in that public sector bodies are subject to general administrative law principles in the application of statutory rules, regulations and Acts of Parliament. Considerations relevant to the contract of employment are of course important, but they are not the only considerations in public sector employment: see generally *Aspects of Public Sector Employment Law* 1988, G McCarty; *Malloch v Aberdeen* (1973) 1 WLR 1578."
- 15 The applicant maintains the Arbitrator has power to void an unlawful decision and relies on the decision in *Civil Service Association of WA Incorporated v Director General, Ministry of Justice* [2002] 82 WAIG 2858 at 2862 in support of its argument.
- 16 The applicant claims that the respondent's Director General acted unlawfully on the following grounds:
1. Once a power is delegated the person with the delegated power must act without interference and that an exercise of discretionary power at the direction or the behest of another person is an improper and unlawful exercise of power.
  2. It is unlawful for the Director General to seek to direct the Executive Director (who was delegated the power to make the particular decision) in the exercise of his powers. In accepting and acting on that direction the Executive Director rendered his subsequent decision unlawful.
  3. The Executive Director acted unlawfully when he rescinded the decision that Mr Jones be selected for appointment.
  4. A decision maker should only take into consideration issues that are relevant to the decision. It is an improper and unlawful exercise of power if irrelevant considerations affect the decision. (*Roberts v Hopwood* [1925] AC 578 House of Lords (England)). The Executive Director should not have taken account of the Director General's comments about Mr Jones, which were received after the selection process had been completed.
  5. The actions of the respondent in interfering with the selection process amounted to using the process for performance management of Mr Jones, which is an improper purpose (*R v Toohy (Aboriginal Land Commissioner) Ex Parte Northern Land Council* (1981) 151 CLR 170).
  6. Reasonable expectation and estoppel are legal doctrines not covered by the standards and it is open to the Commission to take these matters into account when dealing with this matter.
- 17 The applicant maintains that the remedy sought by this application is one within the Arbitrator's powers and argues that the arbitrator has the power to declare certain actions void and to issue any appropriate additional orders requiring the respondent to act lawfully when completing its administrative tasks.

### **Findings and Conclusions**

- 18 Section 80E(7) of the Act limits the jurisdiction conferred on the Arbitrator under the Act as this section prevents the Arbitrator from dealing with any matter referred to in s97(1)(a) of the PSM Act. Section 97(1)(a) of the PSM Act reads as follows:
- "(1) The functions of the Commissioner under this Part are:
- (a) to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards."
- Additionally, s23(2a) of the Act limits jurisdiction:
- "(2a) Notwithstanding subsections (1) and (2), the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act."
- 19 Section 80E(1) of the Act reads as follows:
- "(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally."
- 20 Section 80E(5) of the Act prescribes what the Arbitrator may do in the exercise of his or her jurisdiction:
- "(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."
- 21 I accept that Mr Jones is a government officer and that this issue concerns an industrial matter as defined in the Act as it relates to Mr Jones' rights as an employee.
- 22 The question to be determined in this case is whether or not the relief sought by the applicant relates to a breach of a public sector standard specifically the standard applying to recruitment, selection and appointment. The Recruitment, Selection and Appointment Standard is as follows:

**“Outcome**

The most suitable and available people are selected and appointed.

**The Standard**

The minimum standard of merit, equity and probity is met for recruitment, selection and appointment if:

- A proper assessment matches a candidate’s skills, knowledge and abilities with the work-related requirements of the job and the outcomes sought by the public sector body, which may include diversity.
- The process is open, competitive and free of bias, unlawful discrimination, nepotism or patronage.
- Decisions are transparent and capable of review.”

It is also the case that regulations exist that allow a claim in relation to a breach of this standard **to** be lodged where a decision to appoint or not appoint a person to fill a vacancy has been made.

- 23 It is clear that the Arbitrator has no power to enquire into or deal with any matter dealing with a breach of a public sector standard. However, it is also the case that s80E of the Act gives the Arbitrator jurisdiction to deal with an industrial matter concerning a government officer as long as the matter the subject of the application does not fall within the ambit of the relevant public sector standard.
- 24 On the information before me it is my view that the issues involved in this matter fall within the Arbitrators’ jurisdiction. The applicant’s complaint centres on whether or not the Director General lawfully and validly exercised his statutory powers when he became involved in the selection process for the Level 7 position which resulted in a decision to reverse the recommendation to appoint Mr Jones to the Level 7 position. In my view this is an issue which does not relate to a breach of the Recruitment, Selection and Appointment Standard as it is a dispute about the lawfulness of the Director General’s actions in intervening in the selection process relating to the Level 7 position after Mr Jones had been advised by the respondent that he had been recommended for appointment to this position. In reaching this view I rely on the authority contained in the Full bench decision of the *Civil Service Association of WA Incorporated v Director General, Ministry of Justice* (op cit) and in particular at p2862 where his Honour, the President stated:

“There was also a submission that there was no jurisdiction in the Commission to declare the transfer invalid because what was being sought was the judicial review of an administrative act. That, it was submitted, on behalf of the respondent, was outside the jurisdiction of the Commission constituted by the Arbitrator, which, so constituted is not a superior court. Jurisdiction in this matter was said to be conferred, as I have said, by s.80E of *the Act*.

S.80E(1) of *the Act* reads as follows:-

- “(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally.”

S.80E(5) of *the Act* prescribes what the Arbitrator may do in the exercise of his jurisdiction. S.80E(5) reads as follows:-

“80E. Jurisdiction of Arbitrator:

- (5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division.”

The section seems to prevent the Arbitrator interfering with any employer’s exercise of its/his/her duties under the section in relation to any government officer or office under the administration of the employer in relation to any matter within the jurisdiction of an Arbitrator.

However, it is clearly and unambiguously prescribed in s.80E(5) as follows, namely that:-

“any act, matter or thing done by an employer in relation to any such matter ((ie) within the jurisdiction of an Arbitrator), is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him or his jurisdiction in respect of that matter under this Division.”

It is quite clear, therefore, that the decision to transfer and the request or direction for transfer of Ms Bowles was within the jurisdiction (sic) of the Arbitrator. I say that for the reason which I express hereinafter.

The purported transfer of Ms Bowles was the act, matter or thing was liable to be reviewed, nullified, modified or varied by the Arbitrator in this case. That is so because it was an act, matter or thing purported to be done or done by an employer as prescribed in the *PSM Act*, s.80(E)(5), in relation to a matter within the jurisdiction of the Arbitrator. The purported transfer was clearly a matter within the definition of “industrial matter” in s.7 of *the Act* because it affected or related to or pertained to the work privileges, rights or duties of both the employer and the employee in an “industry” as defined in s.7.

Accordingly, it was open to the Commission to find that it was unlawful, or ultra vires by way of the review, or to enable the Arbitrator to modify or vary the act of the respondent.

Most cogent in this case is the power which exists under s.80E(5) of *the Act* to nullify. To “nullify” means, in its most relevant definition “To render or declare legally void or inoperative: to nullify a contract” (see *“The Macquarie Dictionary” (3<sup>rd</sup> Edition)*).

There is also, therefore, expressly conferred on the Arbitrator the power to nullify ((ie) to render or declare void the decision and other acts matters or things done to effect or to attempt to effect) the transfer to Hakea Prison of Ms Bowles. Equally as cogent is the express power to review contained in s.80E(5).

Since the express power and jurisdiction exists to nullify any act of the Chief Executive Officer, as an employer, it follows that the Arbitrator is not prevented from doing acts or giving orders or directions which are usually confined to the process of judicial review in a court in order to review, modify, vary or nullify such an act. If there was a restriction on that power, Parliament would have expressly said so. It did not. Further, the act sought to be reviewed clearly fits within the definition of an “industrial matter” as it appears in s.7 of *the Act* (see also s.80E(1)). I would therefore find that the power to nullify, modify or otherwise deal with the decision to transfer in accordance with *the Act* was within jurisdiction. I say that because the decision to transfer Ms Bowles and the purported transfer of Ms Bowles was an act

which affected and directly related to the rights, duties and obligations of both an employer and an employee in an industry as defined. The act sought to be nullified, modified, reviewed or varied was and is an act, matter or thing done by an employer in relation to a matter within the jurisdiction of the Arbitrator namely an industrial matter relating to a government officer (see s.80E(1)). It is therefore within jurisdiction whether the act complained of is or was an administrative act or not.

There was, therefore, clearly, express jurisdiction to vary modify or indeed to render void by declaration all or any of the acts, matters or things done effected or attempted to be done or effected by the respondent.

In that this related to what was done or sought to be done pursuant to statutory power under the *PSM Act* there was clear jurisdiction to nullify, vary or modify what was done.

The *Ishmael Case* (op cit) is authority for a number of propositions. These include S80E(7) of the *Act* which deprives the Arbitrator of jurisdiction to enquire into or deal with or refer to the Commission in Court Session or the Full Bench any matter in which a procedure referred to in s.97(1)(a) of the *PSM Act* is or may be prescribed under that Act.

However, the question for the Arbitrator was not and could never be whether there was a breach of the prescribed standards, because the prescribed standards could only be applicable to an act of transfer or purported act of transfer which was lawful and/or within power, not one which was void. S.97(1)(a) of the *PSM Act* does not operate in its terms, it is trite to observe, to deprive the Arbitrator of jurisdiction to determine whether there is a valid exercise of power under s.65 of the *PSM Act*. Indeed, it confers it."

25 Given this authority and given the terms of s80(E)(5) of the Act it is my view that the Arbitrator has the power to review the lawfulness the Director General's actions in relation to this matter.

26 I therefore find that the Arbitrator has jurisdiction to deal with this application.

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**2004 WAIRC 10994**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	<b>APPLICANT</b>
	-v- DIRECTOR GENERAL, DEPARTMENT OF JUSTICE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON PUBLIC SERVICE ARBITRATOR	
<b>DATE OF DECLARATION</b>	TUESDAY, 30 MARCH 2004	
<b>FILE NO/S</b>	PSAC 51 OF 2002	
<b>CITATION NO.</b>	2004 WAIRC 10994	

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**Result**                      Jurisdiction found.

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*Declaration*

HAVING HEARD Mr J Dasey on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby declares:

THAT the Public Service Arbitrator has jurisdiction to deal with this application.

(Sgd.) J L HARRISON,  
Commissioner,  
Public Service Arbitrator.

[L.S.]

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**2004 WAIRC 11021**

**RELATION TO THE COMPETENCY PROGRESSION OF EMPLOYEES**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)	<b>APPLICANT</b>
	-v- DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS CAPACITY AS BOARD OF THE METROPOLITAN HEALTH SERVICES AT PMH & SCGH	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR	
<b>DATE OF ORDER</b>	THURSDAY, 1 APRIL 2004	
<b>FILE NO</b>	PSAC 36 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11021	



## INDUSTRIAL MAGISTRATE—Complaints before—

2004 WAIRC 10867

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT JOSEPH LEE, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION	<b>CLAIMANT</b>
	-v- HANSSSEN PTY LTD	
		<b>RESPONDENT</b>
<b>CORAM</b>	MAGISTRATE RH BURTON IM	
<b>DATE</b>	THURSDAY, 22 JANUARY 2004	
<b>FILE NO</b>	M 126 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10867	

### Representation

<b>Claimant</b>	Mr RJ Andretich (of Counsel) and with him Mr J Lee on behalf of the Claimant.
<b>Respondent</b>	Mr AD Lucev (of Counsel) and with him Ms K Primrose (of Counsel) on behalf of the Respondent.

### *Reasons for Decision*

- 1 By this claim the Claimant seeks the enforcement of a civil penalty under the *Industrial Relations Act 1979* (the Act). It is alleged that the Respondent hired security guards to prevent authorised union personnel from coming onto its building site situated at 78 Terrace Road, Perth, which is a breach of section 49M of the Act.
- 2 This is a decision on a preliminary point.
- 3 The Claimant, who is an Industrial Inspector appointed under Part 3 of the *Public Sector Management Act 1994*, audio-recorded an interview at his office with Mr Gerardus Peter Hanssen who is the sole director of Hanssen Pty Ltd, the Respondent. It is argued by the Respondent that the interview is inadmissible in these proceedings as it was obtained unfairly. Produced in evidence are the tape and a transcript made by the Claimant and the Respondent.
- 4 On 10 July 2003 Industrial Inspector Lee telephoned Mr Hanssen at his office and invited him to come to his, Lee's, office at the Department of Consumer and Employment Protection (DOCEP) to participate in an audio-recorded interview to deal with a complaint concerning the happenings on 30 June 2003 in relation to the building site at 78 Terrace Road, Perth.
- 5 Industrial Inspector Lee told Mr Hanssen that the interview was voluntary and not a matter of compulsion. Mr Hanssen said he was happy to participate. The interview took place at the Industrial Inspector's office in West Perth at about 10 00 o'clock on the morning of 11 July 2003.
- 6 The transcript of the interview is some 300 paragraphs long.
- 7 At the beginning of the interview there is the usual police interview caution. At paragraph 18 of the Respondent's transcription of the interview there appears the following:
 

*GH I know I'm quite - I'm quite happy to do that because that's the only way that you can bring this out in the open and really what is what part ..... means and what improper behaviour means and what intimidation means and whatever.*

*JL Alright. Well bearing that in mind you obviously have to continue with this interview bearing the caution in mind you have to continue with this interview.*

*GH Yes, yes, yes."*
- 8 The Claimant's transcription is practically identical.
- 9 Industrial Inspector Lee was recalled after the Respondent outlined its objections as part of the voir dire as to voluntariness and said that he could not recall saying the above and thought he said the opposite.
- 10 I have listened to the sealed master-tape. It is obvious from the tape that the words quoted above were spoken by Industrial Inspector Lee.
- 11 The Respondent says that the interview and the transcripts are unfair and that I should exercise my discretion and reject the contents of the taped interview. I should do that for the following reasons. Firstly, the Industrial Inspector did not rewind the tape. I find there is nothing in that submission. Next, there is a break in the tape according to the transcript. I will deal with that later in these reasons.
- 12 Mr Lucev for the Respondent says that the interview is unfair when all the circumstances in which it was conducted are considered. He submits the situation before me comes within the terms expressed in two High Court cases, *R v Lee (1950) 82 CLR 133* and *McDermott v R (1948) 76 CLR 501*.
- 13 I first decide that Industrial Inspector Lee is a public officer and as such, and as the Claimant, is a person in authority because he could influence the course of the proceeding or the manner in which the Respondent is treated (see *R v Dixon (1992) 28 NSWLR 215 at 229*).
- 14 The Respondent further submits that the interview is unreliable because of the means by which, and the circumstances in which, it was produced and that leads to a forensic disability for the Respondent.
- 15 I find that the Mr Hanssen was told over the telephone on 10 July 2003 what the interview was to be about. He was not told that again at the start of the interview on 11 July 2003.
- 16 In the interview Mr Hanssen talks a lot about unions and union coercion generally. If the rules as to admissions in criminal cases apply then the words spoken by the Industrial Inspector quoted above would render the interview inadmissible. The general discussion relating to unions would not be inadmissible under the criminal test but there would be doubts as to relevance.

- 17 The Industrial Inspector does not say whether it is Mr Hanssen or his corporation that is being investigated. He is not told that it is a safety breach under the *Occupational Health and Safety Act* that is being investigated. He is not told at the beginning of the interview that he could be charged. The criminal rules of investigation allow investigation up to the point where there is sufficient to charge the Respondent. If I had to assess that I would find that that point had been reached before this interview began.
- 18 Mr Hanssen was not told what Court was to be involved.
- 19 I find that not allowing Mr Hanssen to obtain other information does not affect the situation. That would have been nice but it is not vital and the same can be said in relation to Mr Hanssen obtaining legal advice.
- 20 There are places in the interview where the Industrial Inspector could have further explained the situation to Mr Hanssen and allowed him to explain.
- 21 It appears from the interview that the people on the gate may have been just checking to see if the authorised persons could come onto the site.
- 22 As to the power to conduct the interview, to which section 98(2) of the Act is relevant, I find that the Minister has given no direction as to the Industrial Inspector conducting the interview with Mr Hanssen.
- 23 Section 98(2)(d) of the Act only allows an interview of a person found in an industrial location, not at the Industrial Inspector's office.
- 24 Put briefly the Claimant's answer to the above is that the proceedings before me are not criminal and in any event those rules do not apply to these proceedings as they are civil. The standard of proof in this matter is the civil standard of the balance of probabilities, further showing that the application for the enforcement of a civil penalty is a civil matter.
- 25 The question I have to decide is whether the criminal evidence rules relating to the admissibility of admissions apply to an Industrial Inspector investigating a breach of the Act in an action by way of claim to recover a civil penalty.
- 26 An application to enforce a civil penalty is not a criminal proceeding (see *NW Frozen Foods [1996] 1134 FCA 20 .12.1996* (an unreported decision) and see also *TPC v ABBCO (1994) ATPR 41-342*).
- 27 However, it is a proceeding for a penalty and has consequences for the Respondent and his reputation and it is more than merely a civil proceeding (see *TPC v TNT Management 58 ALR 423*).
- 28 It is punitive with a resemblance to fines imposed on criminal offenders (see *Butterworth's Australian Corporations Law 15 10090 footnote 20* - the cases mentioned at footnote 40 do not deal with civil penalties).
- 29 Both the Australian Securities and Investment Commission (ASIC) and the Australian Consumer and Competition Commission (ACCC) have civil penalty provisions that are similar to those I am dealing with here.
- 30 The ACCC has a policy of giving a formal warning and it has adopted the Judges Rules that are the foundation for the Respondent's argument (see *CCH ATPR 18-245*).
- 31 ASIC investigators are subject to having interviews rejected if they are unfair (see *Butterworth's Australian Corporations Law 15 .1 .0045 footnote 20*).
- 32 In civil cases I can have regard to voluntariness in relation to the weight to be given to evidence (see *R v Governor of the Metropolitan Gaol; Ex parte Di Nardo [1962] 3 FLR 271*).
- 33 I decide that the Industrial Inspector does not have the authority to conduct the interview as the Act only gives him power to interview a person found on an industrial site.
- 34 I decide that the rules as to obtaining admissions in criminal cases apply.
- 35 I decide that the quoted conversation at paragraph 18 of the transcript is sufficient to reject the interview without further grounds.
- 36 However, I also decide, because of the matters raised by the Respondent, that in all the circumstances of this particular case it would be unfair to admit the interview.
- 37 I decide that nothing turns on the fact that the tape was not rewound.
- 38 The Respondent raised the issue of there being a break in the tape. I have now carefully listened to the master-tape and there is no break. The import of the missing words in the Respondent's copy is to the effect that Mr Hanssen would not have let the union officials on the site if Mr Remington had not overruled him. Mr Hanssen said such an overruling was Mr Remington's prerogative. Had I admitted the tape Counsel would have had to address me about those missing words.
- 39 The interview is not to be admitted. In accordance with the arrangement I made at the date of the hearing the Clerk to the Industrial Magistrates Court has informed Counsel for both sides of the conclusion that I have reached and has arranged for the matter to be re-listed for further hearing today.
- 40 I now publish the reasons for my decision.

**R H BURTON,**  
Industrial Magistrate.

**2004 WAIRC 10868**

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT	
<b>PARTIES</b>	JOSEPH LEE, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION	<b>CLAIMANT</b>
	-v-	
	HANSEN PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	MAGISTRATE RH BURTON IM	
<b>DATE</b>	WEDNESDAY, 10 MARCH 2004	
<b>FILE NO</b>	M 126 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10868	

**Representation****Claimant**

Mr RJ Andretich (of Counsel) and with him Mr J Lee on behalf of the Claimant.

**Respondent**

Mr AD Lucev (of Counsel) and with him Ms K Primrose (of Counsel) on behalf of the Respondent.

*Reasons for Decision***The Claim**

- 1 This is an application pursuant to section 83E of the *Industrial Relations Act 1979* (the Act) alleging a contravention of a civil penalty provision. The application alleges a breach of section 49M(1) of the Act in that on 30 June 2003 the Respondent refused to permit accredited union officials, namely Michael Buchan and Joseph McDonald, entry to a site where construction work was being carried out at 78 Terrace Road, Perth of which the Respondent was the occupier.
- 2 The claim for entry was made during working hours in relation; it is alleged, to occupational health and safety matters where employees, who were employed by Australian Piling Co and who could have been members of the officials' union, were working. The relevant union was The Construction, Forestry, Mining and Energy Union of Workers (the CFMEU). The claim for entry was made by the officials to a representative of the site management. There had been a notice issued stopping work on the site because of the muddy, wet conditions at the rear of the site. There were security guards on the site behind closed gates who refused the officials entry.
- 3 Gerardus Peter Hanssen, the sole director and shareholder of the Respondent, attended later and also did not permit the union officials entry. Subsequently a Mr Ric Rimington, a representative of the development company, attended and, after discussions, the officials and other persons were let onto the site.

**The Law**

- 4 Section 83E of the Act relevantly provides:

***83E. Contravention of a civil penalty provision***

- (1) *If a person contravenes a civil penalty provision, an industrial magistrate's court may make an order imposing a penalty on the person, not exceeding —*
- (a) *in the case of an employer, organisation or association, \$5 000; and*
- (b) *in any other case, \$1 000.*
- (2) *Subject to subsection (3), if a person contravenes a civil penalty provision an industrial magistrate's court may, instead of or in addition to making an order under subsection (1), make an order against the person for the purpose of preventing any further contravention of that provision.*
- (3) *...*
- (4) *An order under subsection (2) —*
- (a) *may be subject to any terms and conditions the court thinks appropriate; and*
- (b) *may be revoked at any time.*
- (5) *An interim order may be made under subsection (2) pending final determination of an application under this section.*
- (6) *An application for an order under this section may be made by —*
- (a) *a person directly affected by the contravention or, if that person is a represented person, his or her representative;*
- (b) *an organisation or association of which a person who comes within paragraph (a) is a member;*
- (c) *the Registrar or a Deputy Registrar; or*
- (d) *an Industrial Inspector.*
- (7) *An application under subsection (6) must be made in accordance with regulations made by the Governor.*
- (8) *The standard of proof to be applied in determining whether there has been a contravention of a civil penalty provision is the standard observed in civil proceedings.*
- (9) *A person must comply with an order made against him or her under subsection (2).*
- Penalty: \$5 000 and a daily penalty of \$500.*
- (10) *Where, on an application under subsection (6), the industrial magistrate's court does not make an order under subsection (1) or (2), the court may, by order, dismiss the application.*
- (11) *An order under subsection (1), (2) or (10) may be made in any case with or without costs, but in no case shall any costs be given against the Registrar, the Deputy Registrar, or an Industrial Inspector.*
- (12) *In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the industrial magistrate's court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.*

- 5 Section 49M of the Act is in the following terms:

***49M. Conduct giving rise to civil penalties***

- (1) *The occupier of premises must not refuse, or intentionally and unduly delay, entry to the premises by a person entitled to enter the premises under section 49H or 49I.*

- (2) *A person must not intentionally and unduly hinder or obstruct an authorised representative in the exercise of the powers conferred by this Division.*
- (3) *A person must not purport to exercise the powers of an authorised representative under this Division if the person is not the holder of a current authority issued by the Registrar under this Division.*

### **The Evidence**

#### **Darryl Tancred**

- 6 Darryl John Tancred, a WorkSafe Inspector, gave evidence. He said that he had been to the site on 10 June 2003 in relation to safety concerns. A number of notices were issued relating to safety and on 11 June 2003 he returned to the site and issued further notices, in particular for a breach of regulation 3.6 of the *Occupational Safety and Health Regulations 1996*. The basis for the issuing of a notice is that the Inspector was of the opinion that there was a risk of imminent and serious injury. The notices prevented work but, needless to say, permitted remedial work. Mr Tancred said that it was really an honour system for rectification.
- 7 He said he returned to the site on 25 June 2003 having received a complaint which had been passed on to him by the Chief Inspector, who asked him to attend the site as soon as possible. He said that there had been some attempt to fix the problems and that there was evidence that trucks had been used. He said Mr Hanssen later made an application for some modifications to the notices.

#### **Michael Buchan**

- 8 Michael John Buchan gave evidence. He said he was a union organiser with the CFMEU and worked in the health and safety areas and was qualified to assess site risks. He held a permit to let him enter construction sites. He said he had been to the site in early June and had seen the conditions. He had complained to WorkSafe as there was construction work going on there and the conditions could injure someone. He had been to the site a number of times in June and had spoken to Mr Hanssen about the matter. There was a prohibition notice in effect applying to the rear of the site.
- 9 He said he was at the site on 30 June 2003 when Mr McDonald arrived. He had gone to the site to see if the notices had been complied with. He arrived about 6.45 am but work did not start until 7.00 am. The gates were shut and there were security guards in front of them. There is a footpath in front of the gates. There were men from the Australian Piling Co working there. He said he had identified himself as a union official. He said the men knew him and he was wearing a shirt with a union logo on it. He was told he could not get access to the site. He tried to phone someone. He was told by Rod, the site supervisor, that if he wished to get access he would have to contact Mr Hanssen. Later he was told that Mr Hanssen was on his way down. Men working for the piling contractor came out onto the footpath at one stage. There were union men on the site working for Australian Piling Co. Work started at 7.00 am and at least by 7.30 am there was work being carried out.
- 10 He went and had a coffee and returned at 8.00 am when he saw Mr Hanssen present. Mr Hanssen said he could not go onto the site. He said that if he went onto the site it would cost him \$7,000.00 for each official. He testified that he told Mr Hanssen of the problems at the back of the site.
- 11 Later Ric Rimington, a senior representative of the company developing the site, arrived and there were various conversations including some between Mr Rimington and Mr Hanssen. The officials were subsequently let onto the site. They included an Inspector called Lee and a lawyer named Kucera, who worked for the union, as well as Mr McDonald. He thought it was about 8.30 am - 9.00 am that that occurred. Some remedial work had been done. Rod said he would attend to the rest of the problems.
- 12 Mr Buchan said he had been allowed access before and after 30 June 2003. In fact he re-attended the site in July.
- 13 Photographs of the site were tendered through Mr Buchan.

#### **Timothy Kucera**

- 14 Timothy Robert Kucera gave evidence. He said he was a union employed lawyer with an entry permit. He attended the site at about 7.45 am. He said the gates were locked and there were security guards behind them. Messrs McDonald and Buchan were on the footpath, work was going on and there were members of the union on the site. Mr Hanssen came out through the gates. He at first said he would allow Kucera to go onto the site as he was a lawyer; but then refused when he found out he had a permit and was employed by the union.
- 15 Mr Hanssen mentioned the \$7,000.00 proposition referred to above. He stated no union organisers were going to come onto the site. Mr Kucera said all three of them had a right to go onto the site for safety reasons and Mr Hanssen responded that they would have to first pay \$7,000.00 each.
- 16 He said they went and had a coffee and returned and were let onto the site after discussions between Mr Rimington and Mr Hanssen.
- 17 He said in cross-examination that he did not know if he had the consent of the occupier before he finally went onto the site. He said that they all got onto the site after 8.00 am.
- 18 It was not unusual to have a discussion to resolve the problem of site access. There was a security guard locking and unlocking the gates. He had visited the site since

#### **Joseph McDonald**

- 19 Joseph McDonald gave evidence that he was the Assistant Secretary of the CFMEU and was an authorised person under section 49 of the Act. He held a permit enabling entry onto the site. He said that he knew Mr Hanssen and had previously been to the construction site. On 30 June 2003 he went to the site again having been there four or five days before in relation to safety matters. He was there at 6.45 am. Work usually began at 7.00 am. He said people were getting ready to work. Mr Buchan was also there. The gates were locked and there were security guards on the gates. He said he wanted to go onto the site for union business concerning problems with the job at the back of the site. He said that he had a right of entry. He identified himself. The reply was that there were instructions not to let unions onto the site. He in turn told them they were breaking the law. He was pushed back out the gate. He requested that Rod be called. Rod then went out and Mr McDonald repeated himself. In response Rod said that Gerry (Hanssen) had instructed that no unions be allowed onto the job and further that Gerry had to be told if officials came to the site. Further, union officials were to be told that Gerry was on his way down to the gates. Mr McDonald said there were union members at the site. The gates were locked and unlocked as workers came and they were subsequently left open. As he had been there previously he knew there was a piling crew working at the back of the site where the problems were.

- 20 Upon arrival at about 7.30 am Mr Hanssen told him he was not going to let them on the site as there had been difficulties. He told Mr Hanssen that he wanted to see the back of the site. There was discussion about the payment of \$7,000.00 to get in and things got a bit heated. Mr Rimington arranged for them to get onto the job. The foreman said that he would set the site right. He said he eventually got onto the site between 9.00 am and 10.00 am.
- 21 In cross-examination, he denied he was told by those on the gate that they had to get instructions. One went to get the project manager. The foreman said he was waiting for Mr Hanssen to come onto the site and he would decide. Mr Hanssen never asked for a reason as to why they wanted to go onto the site. He said that Mr Hanssen said he had the security guards there to keep the unions off the site. He also conceded that sometimes lawyers are involved in site entry issues.

#### **Joseph Lee**

- 22 Joseph Paul Lee gave evidence. He said he was the senior investigating officer with the Building Industry Inspectorate. After a call on the telephone he arrived at the site at 9.00 am. Mr Hanssen was out the front with the others. There was a chain on the gates and security guards were inside. Mr Hanssen said he was not prepared to let union organisers onto the site. Mr Lee advised him of section 49M of the Act. He was let in after Mr Rimington arrived and following discussions. They were subsequently let in sometime between 9.35 am and 9.40 am.
- 23 Mr Lee telephoned Mr Hanssen on 10 July 2003 to see if he would agree to an interview concerning what had occurred. Mr Hanssen agreed and the interview took place on 11 July 2003. I will not refer to evidence of what was said at interview because I have ruled that what transpired at that interview was inadmissible. I decided the criminal investigation rules as to confessions and admissions apply to an application to enforce a civil penalty. I found that the interview was unfair. I also decided that Mr Lee could only interview a person found on a construction site. I published reasons for that decision on 22 January 2004.
- 24 During the course of Mr Lee's evidence a letter dated 28 June 2003 (exhibit H) from the Respondent to Kevin Reynolds, the Secretary of the CFMEU, was tendered. The letter stated inter alia that because of difficulties at the site security guards had been hired to stop organisers going onto the site. If someone wished to visit the site they were required to make a personal appointment with Mr Hanssen and outline their reasons for the visit.
- 25 Mr Lee said that in August of the previous year Mr Hanssen had been told of the new provisions in the Act relating to the right of entry and had been given some written material about that. Mr Lee told Mr Hanssen that the officials had a legitimate right of entry and Mr Hanssen refused to permit them onto the site.
- 26 In cross-examination Mr Lee said Mr Hanssen was standing nearby when the officials were let onto the site. Mr Hanssen was the sole occupier. Mr Hanssen was concerned about the legislation. He said that he had had no direction by the Minister in relation to the site. Mr Hanssen did not say, on that day, that if they had legitimate reasons they could come onto the site.
- 27 The Respondent elected not to call evidence.

#### **Elements of the Contravention**

- 28 I set out the elements of the contravention that need to be proved on the balance of probabilities:
1. The "occupier" or person in charge of the premises, being 78 Terrace Road, Perth (section 49L).
  3. Relevant employees, that is, members of or persons eligible to be members of the organisation mentioned above, were working on the site (sections 49G and 49M(1)).
  4. The persons entitled to enter were refused entry to the premises (section 49M).
  5. The purported refusal occurred during working hours (section 49I(1)).
  6. The persons refused entry were authorised person who had a current authority from the Registrar to represent an organisation called The Construction, Forestry, Mining and Energy Union of Workers (section 49G).
  7. The persons refused entry were requested to show their authority (section 49L).
  8. The persons refused entry had sought entry to investigated a breach of the *Occupational Safety and Health Act 1984* (section 49I(1)).
- 29 Each element of the contravention must be proved.
- 30 I decide that, as the right of entry provisions take away an occupier's rights and bestow rights on union officials who would otherwise be unable to go onto building sites, that the provisions should be interpreted strictly according to the applicable standard of proof being on the balance of probabilities.

#### **Conclusions of Fact**

- 31 I find that both Mr McDonald and Mr Buchan were at the site about 6.45 am and that work had started at 7.00 am. They eventually entered onto the site about 9.35 am to 9.40 am. I find that a safety notice had been issued. I further find that Mr Buchan and Mr McDonald had the required permits. I decide that the gates were locked and that there were security guards attending them. I also find that there were men on the site who could be members of the relevant union.
- 32 I accept that the two officials were not initially allowed to enter the site. They were permitted onto the site only after Mr Rimington had discussions with others, including Mr Hanssen. I find that there is often discussion concerning letting union officials onto sites. I am satisfied that Mr Hanssen said they could go onto the site if they paid \$7,000.00.
- 33 I find that at all material times the Respondent was the occupier.

#### **Submissions and Conclusions of Law**

- 34 I now deal with the submissions made to the Court. Mr Andretich commenced and Mr Lucev followed, however, I allowed a right of reply given that I was concerned that all the matters properly raised should be addressed.

#### **Claimant's Submissions**

- 35 I deal firstly with the Claimant's submissions.
- 36 It was submitted that the two men had a right of entry for suspected breaches of the *Occupational Safety and Health Act 1984*. The Respondent was the occupier and construction work was being undertaken. The two men were refused entry whilst there were members of the CFMEU on the site.
- 37 The two men were investigating to see if the Respondent was complying with the prohibition and improvement notices. It is submitted, and I so find, that the union has a role to play in policing the Act. It was a bona fide attempt, says the Claimant,

to make sure men would not be required to work in areas contrary to the prohibition notices. I find such to be the case. The notices required work to be done to improve the worksite as there was a risk of imminent and serious injury to a person. The possibility of an offence is sufficient, as it is only an offence if a Court so holds. Such an example could be one of failing to provide a safe place of work.

- 38 Work started at 7.00 am and the two men were blocked from entry by the security guards. Mr Hanssen also said they could not come onto the site or only if they each paid \$7,000.00. The fact that union officials had been disruptive in the past I find to be irrelevant. Mr Rimington was the relevant officer of Finbar, the developer, who had contracted with the Respondent to do the construction. I find I have no evidence that Finbar was the occupier.
- 39 What we have here, says the Claimant, is a continuing refusal. I should take into account that a delay could allow a site to be cleaned up. The case before me could be either refusal or delay as a composite contravention. I have been asked to amend the charge if I find that there has been mere undue delay.
- 40 The Claimant referred to a number of authorities to support its case. They included Reg v Honan [1971] 1 NSWLR 697, a breath test case where there was an initial refusal and later a test. It was held in that matter that there had been a refusal. A delay would affect the alcohol concentration in the blood. In Ansett Transport Industries v AFAP (1991) 30 FCR 183 the issue involved an application to inspect documents. The employer did not respond immediately and said it would consider the application. No answer was given on that day and the Court decided that that amounted to hindering. In CMEWU(WA) v R & Y Byl Nominees P/L [1989] 30 IR 263, a case of a refusal to make records available, it was held that the nature of the alleged breaches did not have to be specified.
- 41 In AFMEPKIU v Transfield Services (Australia) Pty Ltd and Another (2003) 83 WAIG 376, a decision of Mr Commissioner Kenner, he decided that the subject provisions of the Act were a code. He decided entrants did not have to comply with the employer's drug and alcohol policy.
- 42 In this matter I find that the evidence does not disclose an entry for an ulterior purpose. In any event in Victorian Association of Forest Industries v CFMEU Print No PR 939097, 9 October 2003, Lawler VP, Lacy SDP, Richards C it was held that the employer was not entitled to know of the suspected breaches. Further in Australian Liquor, Hospitality and Miscellaneous Workers Union v Olten Pty Ltd 80 WAIG 4383 it was held that no written authority was needed for entry nor was it necessary to advise the occupier of the breach.
- 43 I find that delay occurred between 7.00 am and 9.35 am and such constitutes too long a delay and can be characterised as an undue delay.
- 44 I decide that a conditional refusal such as "you can get on the site if you pay \$7,000.00" is a refusal.

#### **Respondent's Submissions**

- 45 I now address Mr Lucev's submissions. Mr. Lucev referred to Queensland Bacon Pty Ltd v Rees (1965-1966) 115 CLR 266 at 303; George v Rockett (1990) 93 ALR 483 at 490-491 and Fisher v McGee [1947] VLR 324 at 327-329 for the Court's assistance.
- 46 He submitted that there was a difference between a suspected breach of the Act and knowledge of a breach of the Act. I find that there is a difference between suspicion, belief and knowledge. I find that the two men had knowledge of facts that could amount to a belief or knowledge of a breach of the Act in that the notices had not been complied with.
- 47 I find that the two men knew of a breach of the Occupational Safety and Health Act 1984. I find that the two officials wanted to enter the site to see if the notices had been complied with. They wanted to see the work carried out under the notices. That poses the question "Is that a suspected breach of the Act?"
- 48 In re Storemen and Packers, Wholesale Drug Stores (State) and other Awards [1951] AR (NSW) 527 is authority for the proposition that there must be a bona fide suspicion of a breach of the Act. Byl Nominees (supra) says there must be suspicion. Further it is submitted that Parliament could have specified if belief or knowledge were proper bases. This was a breach of a prohibition notice. It is said that there is no evidence from the guards that they refused or prevented entry and that that was necessary (see ALHMU v Neatclean Pty Ltd 83 WAIG 3377).
- 49 It is argued that there was access allowed to the site after a period. The legislation contemplates some delay. The section does not create a composite contravention; it is one or the other, a refusal or undue delay.
- 50 I was asked to note that I am considering an application for the imposition of a civil penalty. Contravention of section 49M(1) does not constitute an offence (see section 49O of the Act).
- 51 A number of the authorities cited are distinguishable.
- 52 Caswell v Hundred House JJ (1889) 53 JP 820 was a case where entry was not allowed and then was permitted. The Ansett case (supra) is distinguishable as it was a case alleging hindering. Master Ladies Hairdressers Association of NSW v Hairdressers & Wigmakers Employees Union [1976] IAS Current Review 293 dealt with a suspected breach. The issue here is whether there was a suspected breach on the evidence before the Court.
- 53 Federated Carters and Drivers' Industrial Union of Australia v McKay [1922] 30 CLR 139 was a case of whether the suspected breach had to be declared, which is not the issue here. The same applies to AMIEU v Victorian Valley Beef Pty Ltd (1987) 16 IR 259. The Byl Nominees case (supra) is not relevant.
- 54 Honan (supra) is not relevant as in the case before the Court there can be delay. AFMEPKIU v Transfield (the decision of Commissioner Kenner)(supra) was an application to insert a clause in an award. Olten (supra) was a case on different legislation.
- 55 It was further argued that there was no work going on that could have altered the site; only remedial work.

#### **Reply**

- 56 Mr Andretich replied that the section applies to belief or knowledge as well as suspicion. Mr McDonald had been on the site before.

#### **Determination**

- 57 I now deal with the arguments raised.
- 58 Firstly, I say that I have been unable to find any relevant case where there has been a refusal followed by a later permission to enter. I decide that the charge does not require amendment as a delay of this length amounts to a refusal to permit entry.

- 59 I decide that Mr Lucev's argument that there must only be suspicion is not well founded and there is a right of entry where there is a belief or even knowledge of an offence. The Act has used suspicion as a minimum requirement.
- 60 The evidence before me is that the two men wished to enter the premises to see if the notices had been complied with. Mr Lucev argues that that is not the same as an investigation of a breach of the *Occupational Safety and Health Act 1984*. I decide that is too fine a distinction to draw and that the attendance relating to those notices is sufficient to be regarded as an investigation under the Act. I also decide that evidence from the guards would have had to have been led if the Claimant had only relied on that evidence. Here I have other evidence.
- 61 Relevant to delay being a refusal is the case of *Keen Bros. Pty. Ltd. v Young (1983) 33 S.A.S.R. 481* a decision of the South Australian Full Court sitting In Banco. It related to the inspection by an inspector of potato marketing records where the person at the appellant's office wished to clear the request for inspection with the Managing Director. At page 486 Wells J. says "To defer compliance with a request is not, of itself, a refusal. To defer for an unreasonable time may amount to a refusal. The matter becomes one of fact and degree". At page 488 he states "refusal" means "a final refusal made after reasonable enquiries".
- 62 Also relevantly applied is *Michaels v R [1995] 69 ALJR 686*, a decision of the High Court of Australia, where it was decided that "without undue delay" meant, "as soon as practicable". That, in my view, would only go so far as to probably allow the person on site to inform his boss.
- 63 I also find that Finbar, the developer, was not the occupier of the site, in any relevant sense, as I have no evidence of that. In any event that was not particularised.
- 64 I decide that the contravention created by the section is not a composite contravention.
- 65 I find that the claim has been made out.

**R H BURTON,**  
Industrial Magistrate.

**2004 WAIRC 10665**

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT	
<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>CLAIMANT</b>
	-v-	
	ROSE VALLEY CHEESE CO PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	MAGISTRATE G CICHINI IM	
<b>DATE</b>	WEDNESDAY, 21 JANUARY 2004	
<b>FILE NO</b>	M 166 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10665	

<b>Representation</b>	
<b>Claimant</b>	Mr M Swinbourn.
<b>Respondent</b>	Mr D Meredith (of Counsel).

*Reasons for Decision*

**(as edited by His Worship from the transcript of reasons delivered extemporaneously at the conclusion of the hearing)**

- 1 I am dealing with a claim made by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch against Rose Valley Cheese Co Pty Ltd. The particulars of claim as filed show that the claim relates to two breaches of the *Industrial Relations Act 1979*, but the claim is expressed in the alternative. That is as a breach of section 49M(2) or, in the alternative, a breach of section 102(2) or both. The claim does not make it clear on its face that what is being alleged is two separate breaches of the Act because the way it is expressed. In my view the expression "in the alternative" is most unhelpful.
- 2 Having said that, the Claimant has now made it clear that what the Claimant is alleging here is two separate breaches. The Respondent has been given an opportunity to clarify its position in relation to the matter and indicate whether its "consent to the Court making all of the orders sought in this claim" was in relation to one breach or two breaches. After having obtained instructions, the Respondent's Counsel has now conceded that the Respondent has breached the Act in respect of both section 49M and also section 102. The Respondent had the opportunity to dispute one or both of the alleged breaches but has not taken the opportunity to do so.
- 3 There was also a submission made by Counsel for the Respondent that the alleged breaches are duplicitous. I invited argument on that issue but the Respondent chose not to take the argument any further and consented to the claim in respect of two separate breaches. The Respondent does not now take issue that the claims are duplicitous. Given that the Respondent has not taken issue in that regard, I simply proceed on the basis that the claims are not duplicitous because the matter has not been fully argued, or ventilated, before me so I simply leave it at that. Of course, the Respondent had the opportunity to pursue that issue if it wanted to but has chosen not to.
- 4 The claim alleges two separate breaches, as I have stated. The first breach alleges that Mr Lee, who is an authorised representative of the union, attended Lot 2 Wungong Road, Brookdale, and that on the 27th of August 2003 the Respondent through its employees or representatives told Mr Lee that he had to leave the premises. Further the Respondent through its employees or representatives physically removed Mr Lee from the premises. It is said that the breaches are constituted by those acts. It is the case that the acts are intertwined, there can be no doubt about that, and the course of conduct must be looked at as a whole.

- 5 The Claimant says that I should impose the maximum penalty of \$5000.00 as against the Respondent for each of the breaches. Since I have been sitting in this jurisdiction, which has been for some years now, I have noticed the mindset is for those practising in this jurisdiction is one to seek the maximum penalty. In my view, the maximum penalty is to be reserved for matters of the most serious type where there is simply nothing in mitigation. In my view the same sorts of considerations as set out in the *Sentencing Act 1995* for criminal matters are to be considered appropriate for the imposition of civil penalties in this jurisdiction. Indeed, the dicta of the Supreme Court in respect of sentencing generally, in my view, ought to be applied notwithstanding that I am dealing with breaches of provisions of the *Industrial Relations Act 1979* that relate to the imposition of civil penalties.
- 6 What I need to take into account in considering what penalty to impose is the nature of the conduct and any mitigatory circumstances that have been put to me by the Respondent and, indeed, I need to consider whether the Respondent has breached these particular provisions of the Act or any other relevant provisions. In this case it has not been put to me that the Respondent has any prior record. That must be taken into account by the Court.
- 7 I also take into account that the two breaches are constituted by the one course of conduct. Having said all of that, it is a serious matter for there to be a breach of the *Industrial Relations Act 1979* and it is important that not only the Respondent in this case, but any other employer who is so inclined, be aware of the fact that there are serious consequences for acting in this way. In other words, there should be both a personal and deterrent penalty in the penalty imposed, but having said that, the Court still should have regard to the overriding principles in the sentencing. If one does, then it becomes patently obvious that the maximum penalty is simply not appropriate. Maximum penalties are simply not routinely imposed for first offences. It is as simple as that, even in worst case scenarios if there is no prior record and some mitigatory circumstances. The maximum is simply not appropriate where there has not been any prior breach of the law by the Respondent.
- 8 As I said earlier, the Supreme Court on a number of occasions has made it clear that the appropriate penalty to be handed down for first offences is generally somewhere between one-tenth and one-fifth of the maximum penalty. In my view, I should not derogate from that position. I accept that the breaches are serious. I accept that the penalties should reflect the seriousness of the offence and I accept that the penalties should act as a general deterrent as well. The imposition of the penalties that I am about to impose, in my view, will bring home to the Respondent and others who might be like-minded to act in this way that they simply cannot. For the reasons that I have stated it seems to me that the appropriate way of dealing with these matters is to impose a \$1000.00 penalty, being one-fifth of the maximum penalty in each of the matters. The totality of the penalty will be \$2000.00.
- 9 Accordingly I propose to make the following orders. The Respondent is to pay a civil penalty to the Claimant of \$1000.00 for the breach of section 49M(2) of the Act, and further, that the Respondent pay a civil penalty to the Claimant of \$1000.00 for the breach of section 102(2) of the Act. The third order is that the claim be otherwise dismissed.

**G CICCHINI,**  
**Industrial Magistrate.**

**2004 WAIRC 10863**

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT	
<b>PARTIES</b>	PHIL WILKES	<b>CLAIMANT</b>
	-v-	
	AIR AUSTRALIA INTERNATIONAL PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	MAGISTRATE IG BROWN IM	
<b>DATE</b>	TUESDAY, 27 JANUARY 2004	
<b>CLAIM NO</b>	M 252 OF 2002	
<b>CITATION NO.</b>	2004 WAIRC 10863	

**Representation**

<b>Claimant</b>	The Claimant appeared in person.
<b>Respondent</b>	Mr D Clarke of <i>Senate Pty Ltd</i> appeared as agent for the Respondent.

*Reasons for Decision*  
**(Reasons for decision as to costs)**

- 1 In this matter my reasons for decision were published on 31 October 2003 and the claim in regard to breaches of the Pilots (General Aviation) Awards 1984 was dismissed. Liberty to apply in regard to costs was granted in the event that costs could not be agreed by the parties within 28 days.
- 2 On 5 December 2003 I was informed that the parties could not agree costs. I then made the following orders:
1. That the submissions in relation to the question of costs be made by means of written submissions.
  2. That the respondent file and serve such written submissions and a list of authorities relied upon within 14 days hereof.
  3. That the claimant file and serve his written submissions and a list of authorities relied upon within 14 days thereafter.
- 3 I have now received and read the written submissions as to costs from both parties. The claim by the Respondent, as the successful party, is for \$5,940.71 which is composed of three components:
- |   |              |
|---|--------------|
| 1. Legal work done by T Darge and Company, Solicitors | - \$ 741 .86 |
| 2. Legal work done by Alteruthemeyer & Co, Solicitors | -\$1,598 .85 |
| 3. Services provided by Senate Pty Ltd                | -\$3,600 .00 |

4 There is a threshold question as to whether an order as to costs should be made in a matter which is brought before this Court by way of the small claims procedure established by section 179D of the *Commonwealth Workplace Relations Act 1996*. That section provides:

**“179D Small claims procedure**

(1) *If an action is to be dealt with under this section, subsections (2), (3) and (4) apply in relation to the action.*

(2) *The procedure is governed by the following conditions:*

- (a) *the court may not award an amount exceeding \$5,000 or such higher amount as is prescribed;*
- (b) *the court may act in an informal manner, is not bound by any rules of evidence, and may act without regard to legal forms and technicalities;*
- (c) *at any stage of the action, the court may amend the papers initiating the action if sufficient notice is given to any party adversely affected by the amendment;*
- (d) *a person is not entitled to be represented by counsel or solicitor unless the court permits;*
- (e) *if the court permits a party to be represented by counsel or solicitor, the court may, if it thinks fit, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.*

(3) *In a case heard in a court of a Territory:*

- (a) *despite paragraphs (2)(d) and (e), the regulations made under this Act may prohibit or restrict legal representation of the parties; and*
- (b) *the regulations made under this Act may provide for the representation of a party in specified circumstances by an officer or employee of an organisation of employees or of an organisation or association of employers.*

(4) *In a case heard in a court of a State:*

- (a) *despite paragraphs (2)(d) and (e), if, in a particular proceeding in that court (whatever the nature of the proceeding), the law of the State prohibits or restricts legal representation of the parties-the regulations made under this Act may prohibit or restrict legal representation of the parties to the same extent as that law; and*
- (b) *if, in a particular proceeding in that court (whatever the nature of the proceeding), the law of the State allows representation of a party in that court in some circumstances by officials of bodies representing interests related to the matters in dispute-the regulations made under this Act may provide for representation of a party in specified circumstances by an officer or employee of an organisation of employees or of an organisation or association of employers.”*

5 Given the express prohibition in paragraph 179D(2)(d) it is my view that the claim for legal fees incurred by the Respondent with Mr Darge and Mr Alteruthemeyer must fail. It has not been made known when the work done by these solicitors was actually done i.e. before the current proceedings were commenced or after that time but in any event I am satisfied that in the present case the Respondent is prohibited from claiming those costs from the Claimant. To my knowledge there are no relevant regulations made pursuant to subsections 3 or 4 of section 179D. No permission was granted by this Court pursuant to paragraph 179D(2)(e).

6 The balance of the claim for costs is in respect of work done by Mr Clarke who, as an employee of Senate Pty Ltd, represented the Respondent company during the two days of hearing. The amount claimed appears reasonable in view of the length, complexity and variety of issues raised in the context of this claim.

7 However the Claimant opposes the Respondent's request for costs on the basis that the decision of Industrial Magistrate Cicchini in *Lopdell v Kulin Industries Ltd* 80 WAIG 3287 at 3289-90 should be followed i.e. that the cost of services provided by a registered industrial agent cannot be recovered in this Court. I accept that proposition and adopt what was said by Mr Cicchini in his detailed reasons. Given that this Court was exercising Federal jurisdiction when hearing this claim, there is no basis to suggest that costs should be granted to the Respondent.

8 To the extent that the Respondent says these proceedings were vexatious or frivolous I consider there were significant legal and factual issues raised for determination and my published reasons clearly illustrate that there was an arguable case. The authorities make it clear that it must be a case where, on its face, it is one which no reasonable person could treat as bona fide - see *Norman v Matthews* (1916) 85 KB 857, and Roden J. in *A.G. (Vic) v Wentworth* (1988) 14 NSWLR 481 at 491.

9 For all of the above reasons I am satisfied there should be no order as to costs. I order accordingly.

10 These reasons will again be published by mail.

**I G BROWN,**  
Industrial Magistrate.

## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2004 WAIRC 10926

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

TREVOR WAYNE BERNHARDT

**APPLICANT**

-v-

PLACER DOME ASIA PACIFIC

**RESPONDENT**

**CORAM**

COMMISSIONER S J KENNER

**DATE**

THURSDAY, 4 MARCH 2004

**FILE NO/S**

APPLICATION 36 OF 2004

**CITATION NO.**

2004 WAIRC 10926

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<b>Catchwords</b>	Industrial law - Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – <i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(i), s 29(2), s 29(3).
<b>Result</b>	Application dismissed. Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr T Bernhardt
<b>Respondent</b>	Ms N Wainwright as agent

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*Reasons for Decision*

*(Ex Tempore)*

- 1 The substantive application is one brought by Trevor Wayne Bernhardt against Placer Dome Asia Pacific. The application is one brought pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (“the Act”) by which it is alleged that the applicant was harshly, oppressively and unfairly dismissed on or about 16 October 2003 from his position as a supervisor. The application claims that he was unfairly dismissed by reason of his wrongful summary dismissal for misconduct. The applicant, by his claim, seeks reinstatement.
- 2 The respondent employer filed a notice of answer and counter proposal by which it contests the merits of the applicant's claim but also alleges that the application was lodged in this Commission outside of the time limit required by s 29(2) of the Act, that being 28 days.
- 3 The applicant's application was filed on 12 January 2004 as evidenced by the date stamp of the registry. It is apparent, therefore, that the applicant's claim is some eight and one half weeks or thereabouts outside of the 28 day time limit prescribed by the Act. It is the case, of course, that by the Commission's own motion listing this application today, the Commission has a jurisdiction under s 29(3) of the Act to accept an application out of time should it be minded to do so in the exercise of a discretion.
- 4 The facts in the matter before the Commission, presently, are relatively straightforward and they are as follows. The applicant testified that he was dismissed by the respondent on 16 October 2003 by reason of two allegations against him; firstly, that he was sleeping on the job on occasions and, secondly, that he stole fuel from the respondent for the purposes of his private usage. In relation to his dismissal the applicant commenced proceedings it is common ground, in the Australian Industrial Relations Commission (“the AIRC”) on 1 December 2003. Shortly after his dismissal, it seems from the applicant's evidence some two weeks thereafter he commenced other employment with other employers. Subsequent to filing the applicant's claim in the AIRC the applicant testified that he became aware, it seems, at least, up to or prior to 18 December 2003 that he had commenced his application in the wrong jurisdiction. I will say more about that matter shortly.
- 5 Coming back to the circumstances immediately after the applicant's dismissal, he testified that either on the day or the day after he was dismissed by the respondent he sought legal advice from a firm of solicitors in Kalgoorlie. According to the applicant's evidence that firm of solicitors was not able to see him for some weeks. He thereafter, he says on his evidence about seven to 10 days after his dismissal sought advice from Legal Aid as to his circumstances. The applicant's evidence was that there was some suggestion, after consulting Legal Aid, that he may have 21 days to commence a claim challenging his dismissal within the federal system.
- 6 The applicant's evidence also was that he sought the assistance of a friend, it seems, a former colleague from the respondent company to provide some help to him in preparing his claim and that claim was, as I have already observed, filed in the AIRC on 1 December 2003. I have also observed that, at least, if not prior, but as at 18 December 2003, the applicant was informed that he had commenced that claim in the wrong jurisdiction and he ought bring an application in this jurisdiction and was, at the same time, it seems, on the applicant's evidence, aware that a 28 day time limit applies in this jurisdiction and, indeed, that time limit had expired.
- 7 As to the merits of the applicant's claim, the applicant says that he denies the respondent's allegations against him, firstly, that he slept on the job and, secondly, that he stole fuel from the employer. The applicant also complains that if the respondent had concerns in relation to these matters he ought to have had those matters brought to him “on the spot”, as he said it, and if he was in the wrong then he should have been dismissed at that time and not some two months or thereabouts after as, on the facts, appears to be the case. The applicant, however, accepts that he failed to commence proceedings in the proper jurisdiction and he accepts that that was his fault. The applicant, moreover, says that he wishes to continue with this claim to clear his name.
- 8 The evidence from the respondent went mainly to the procedural issues that the respondent undertook in effecting the applicant's dismissal. That evidence was adduced through the respondent's human resources superintendent, Mr Mincham. His evidence was that once it came to his attention that the allegations had been made against the applicant, there was an investigation process put in train to enable these matters to be thoroughly investigated and allegations put to the applicant in the proper manner. Mr Mincham acknowledged there was some considerable delay from the initial events, upon which the respondent made its decision to dismiss but testified that the delay was for the purpose of ensuring that the evidence obtained was reliable and the process, in short, was thorough. The evidence before the Commission in relation to the applicant's claim is, necessarily, at this stage, given that this is an extension of time proceeding, somewhat scant.
- 9 In relation to the Commission's determination of the matter, I turn to the relevant principles in relation to extensions of time which are now well settled before this Commission. Those principles were, firstly, set out by the Commission, as presently constituted, in the matter of *Nicole Azzalini v Perth In-flight Catering* (2002) 82 WAIG 2992. That decision was considered by the Full Bench of this Commission in the matter of the *Director General of the Department for Education v Prem Singh Malik* [2003] 83 WAIG 3056. In that decision the Full Bench affirmed the approach of the Commission in *Azzalini*.
- 10 In *Azzalini*, as affirmed by the Full Bench, a number of factors were set out as relevant considerations as to whether the Commission should exercise its discretion which it undoubtedly has to accept an unfair dismissal application out of time. Those factors are five-fold and are, firstly, the length of any delay; secondly, the explanation for the delay; thirdly, steps

taken, if any, by an applicant to evidence non-acceptance of the termination of employment and that it would be contested; fourthly, the merits of the substantive application in the sense that there is a sufficiently arguable case and, finally, whether there would be any material prejudice to an employer respondent in granting an application to extend time, although the absence of prejudice to a respondent without more is not a sufficient basis of itself to grant an application for an extension of time.

- 11 The Commission turns to those principles in relation to the evidence before the Commission at this stage of these proceedings. Firstly, the length of delay factor. In this case it is apparent that the delay is substantial. The applicant's delay in commencing these proceedings in this jurisdiction, as the Commission has already observed, is some eight and one half weeks after the expiry of the 28 day time limit prescribed by s 29(2) of the Act.
- 12 Secondly, the explanation for the delay. The applicant says that he originally commenced proceedings in the AIRC on 1 December 2003, based upon what he then thought to be the proper jurisdiction having taken, at least, some advice it seems from, at least, a friend of his who was assisting him in this process. I note, however, that that application filed in the AIRC on 1 December 2003 was, itself, some 18 days out of time in that jurisdiction, there being a 21 day time limit for commencing proceedings in that jurisdiction.
- 13 The issue of jurisdiction was raised by the respondent employer in those proceedings and the applicant was put on notice of that fact. As I have already observed, at least by 18 December 2003, if not before, the applicant was aware that the proper jurisdiction for his claim was this Commission and, moreover, and importantly, was also aware that a 28 day time limit applied in this jurisdiction and that 28 day time limit, had clearly expired by 18 December 2003.
- 14 The evidence of the applicant was that he took some time off for holidays around the Christmas early New Year period and obtained other employment in remote locations. However, despite this, the evidence also is that the applicant did not take steps to have the application filed in this jurisdiction until 12 January 2004, some 25 days or thereabouts after he was notified of both the proper jurisdiction and the time limit which had, by that stage, well and truly expired. There is no evidence before the Commission that the applicant otherwise took steps to obtain assistance from legal or other sources given his circumstances.
- 15 In relation to the third factor, that is, steps taken by the applicant to evidence a challenge to his dismissal, I accept on the evidence that there was some indication by the applicant at the time of his dismissal that he intended to seek legal advice regarding the termination of his employment and it seems also, on the evidence of Mr Mincham, that the respondent anticipated that a claim for unfair dismissal would be made against the respondent. His evidence was, however, that he was somewhat surprised that upon the expiry of the relevant time limit no such claim had been served on the employer.
- 16 As to the merits of the substantive application in the sense that there is a sufficiently arguable case, given the allegations of the applicant and the nature of the issues in dispute, on the evidence before the Commission, presently, the Commission is not able to come to any tentative conclusion on the merits. No issue was taken by the applicant with the procedure adopted by the respondent in his dismissal but he disputes the facts relied upon by the respondent. In the absence of evidence from the respondent on the disputed factual issues, it is not open for the Commission to express any views on the merits of the application and therefore the Commission regards that matter as a neutral factor for present purposes.
- 17 In relation to prejudice demonstrated in the present case, there is no prejudice demonstrated by the respondent above that which would normally be endured in having to defend such a claim, in any event, if the applicant's extension of time is granted by this Commission.
- 18 Balancing all of these factors together on what is before the Commission by way of the evidence and other materials the Commission is not persuaded that it should exercise the discretion, in this case, to accept the applicant's application out of time. It is the case that in these proceedings the applicant was out of time in his application in the AIRC, initially. He then was on notice, it is common ground, from at least 18 December 2003, if not before that time, that he was required to file an application in this jurisdiction and, moreover, and critically, importantly, in my view that the 28 day time limit had well and truly expired by that stage.
- 19 In my opinion, armed with that knowledge, it was incumbent on the applicant to take immediate steps or have immediate steps taken on his behalf to file an application in this jurisdiction to commence these proceedings. The uncontroversial fact is that a period of somewhat in excess of three weeks elapsed before the application was eventually filed in this jurisdiction. As the Commission, as previously constituted, has observed on previous occasions, there is an onus on applicants commencing proceedings in this jurisdiction to do so promptly and within time limits prescribed by the statute and, indeed, to prosecute their claims expeditiously. In my view the time limits are in the statute for a good reason and the Commission is not satisfied, on what is before it on this occasion, that it ought to exercise a discretion to extend the time by accepting the application out of time pursuant to s 29(3) of the Act. Accordingly, for all of those reasons, the application is dismissed and an order will issue in due course in those terms.

2004 WAIRC 10811

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TREVOR WAYNE BERNHARDT	<b>APPLICANT</b>
	-v- PLACER DOME ASIA PACIFIC	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	THURSDAY, 4 MARCH 2004	
<b>FILE NO/S</b>	APPLICATION 36 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 10811	

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr T Bernhardt
<b>Respondent</b>	Ms N Wainwright as agent

*Order*

HAVING heard Mr T Bernhardt on his own behalf and Ms N Wainwright as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2003 WAIRC 10340**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TERRY PATRICK CRANSWICK	<b>APPLICANT</b>
	-v-	
	BURSWOOD RESORT (MANAGEMENT) LIMITED	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE</b>	FRIDAY 19 DECEMBER 2003	
<b>FILE NO/S</b>	APPLICATION 1299 OF 2002 APPLICATION 1094 OF 2003	
<b>CITATION NO.</b>	2003 WAIRC 10340	

<b>Result</b>	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement. Application for contractual benefit allowed.
<b>Representation</b>	
<b>Applicant</b>	Mr A Randles (of counsel)
<b>Respondent</b>	Mr D Jones (as agent)

*Reasons for Decision*

1 This is an application by Terry Patrick Cranswick (“the applicant”) pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* (“the Act”). The applicant alleges that he was unfairly dismissed from his employment as a theatre manager with Burswood Resort (Management) Limited (“the respondent”) on 21 June 2002. The applicant requested that this application be joined to application 1094 of 2003 which was lodged by the applicant pursuant to s.29(1)(b)(ii) of the Act claiming that he is owed a benefit under his contract of employment with the respondent. As the respondent consented to the two applications being joined and as each application involves the same parties I formed the view that it was appropriate for both applications to be heard together. The respondent denies that the applicant was unfairly terminated or that the applicant is due any benefits under his contract of employment.

Background

- 2 The applicant was employed by the respondent and its associated companies from 21 December 1985 until he was terminated due to a redundancy situation on 21 June 2002. At termination the applicant was paid an annual salary of \$68,050.00. In addition to this base salary and superannuation entitlements the applicant was given free parking and dry cleaning and meals were provided by the respondent when the applicant was on duty.
- 3 It was not in dispute that on 1 February 2002 the respondent’s employees were informed of organisational changes in the food, beverage and entertainment areas (Exhibit R5). In March 2002 the respondent informed its employees that a new entity, Burswood Catering and Entertainment Pty Ltd (“BC and E”) was to be established to service Burswood Resort’s operations requirements in respect to food, beverage and entertainment effective as at 22 April 2002. BC and E would also undertake contract work with outside entities. A series of meetings about this restructure and its impact on employees were held on or about 14 March 2002. Exhibit R6 confirms the issues discussed at these meetings. As a result of this restructure the applicant was offered the new position of Operations Manager with BC and E.
- 4 Until this restructure the applicant was employed as the respondent’s theatre manager. The job description of the theatre manager position dated 28 September 2001 is Exhibit A5. Exhibit A6 is a copy of the job description of the Operations Manager position that the applicant was offered as a result of the restructure. On 19 April 2002 the applicant was offered new terms and conditions of employment to complement the new position that he was offered (Exhibit A10). On 14 June 2002 the respondent wrote to the applicant advising him that his existing theatre manager position was redundant effective 21 June 2002 and as the applicant had declined the offer of suitable alternative employment as Operations Manager of BC and E, the applicant was informed that his employment with the respondent would cease as at 21 June 2002.
- 5 Whilst employed by the respondent the applicant’s contract of employment was governed by the terms and conditions of the Burswood International Resort Casino’s Employee Handbook and an offer of employment signed by the applicant on 31 March 1986.

The Applicant's evidence

- 6 The applicant stated that in 1985 he was "head hunted" to work by Burswood Island Resort (as it was then known) in the position of technical manager. As Burswood Resort's operations expanded the applicant's duties changed. In 1993 the applicant became showroom manager and this position was later renamed theatre manager. As a result of this change the applicant's duties changed from dealing with technical issues to venue management. This involved the applicant negotiating contracts with clients, overseeing events management areas such as front of house staff, insurance, box office and catering, as well as managing technicians from the technical services department who worked on various theatre projects. A flow chart outlining the different areas of the applicant's department prior to the restructure was tendered (Exhibit A3). The applicant gave evidence that this structure remained in place until the respondent restructured its operations in 2002.
- 7 The applicant stated that he was successful in his role as theatre manager and his area often exceeded budget expectations. As a result on many occasions the applicant received bonuses.
- 8 The applicant gave evidence that he had a close working relationship with the respondent's technical services manager, Mr Michael Gaff who remained in this position until he was made redundant in March 2002. When the respondent restructured its operations effective late April 2002 the applicant was offered the new position of Operations Manager and Mr Gaff's position of technical services manager was abolished. The applicant gave evidence that the new position of Operations Manager was difficult to undertake as the position combined the duties of his existing theatre manager position with the duties of the technical services manager (formerly Mr Gaff's position). The applicant was told by the respondent that the salary attached to the Operations Manager position would be frozen at the rate that he was currently being paid. The respondent had arrived at this decision on the basis of a review conducted which maintained that the new position of Operations Manager warranted a salary less than what the applicant was currently being paid as theatre manager. Further, the applicant was told that according to this review he was being overpaid in his existing position. The applicant stated that he had not been consulted about this salary review and the decision to freeze the salary of the Operations Manager position. The applicant was particularly concerned that he was being required to accept a salary freeze with no prospect of any increase in the short or long term at the same time as being required to now undertake two senior management roles. The applicant stated that in previous years he was given salary increases through a consultative and transparent review process.
- 9 The applicant maintains that the duty statements detailed in Exhibits A4, A5 and A6 demonstrate that the new job of Operations Manager is a combination of his old position of theatre manager and Mr Gaff's technical services manager position. The applicant informed his manager Mr Darryl Cullen that the requirements of the Operations Manager position were too much for one person to undertake. The applicant testified that when Mr Gaff was made redundant at the end of March 2002 the respondent then required him to increase his duties by undertaking the duties required of the new position of Operations Manager. The applicant stated that even though he did not formally accept the Operations Manager position he endeavoured to meet the requirements of this position. In late March 2002 the applicant made it clear to the respondent that he had concerns about the new position. Following is an email sent by the applicant to Mr Cullen on 27 March 2002 about his concerns, formal parts omitted:

"The new job description for Operations Manager covers all tasks and responsibilities of my current position of Theatre Manager and the position held by Michael Gaff being Technical Services Manager. As you are aware this is a big ask for one person. To be able to achieve desired results it is imparitive (sic) that I receive administrative support additional to Rachael Coomber and that I receive technical support from a Technical co-ordinator.

Your assistance with this request will be appreciated."

(Exhibit A7).

- 10 Mr Cullen responded to the applicant on 6 April 2002 and informed him that an organisation called Staging Connections was being contracted to undertake technical co-ordination to assist him as Staging Connections would be doing the work previously undertaken by the technical services co-ordinator who had been made redundant at the same time as the technical services manager. The applicant was also informed that he could access additional administrative support from a person called Jana who would be located in the convention centre. The applicant stated that even though these initiatives took some of the load from him this additional support was insufficient for him to cope with the additional responsibilities he was expected to undertake in the Operations Manager position. He stated that even though Staging Connections was contracted to undertake technical services work he still had to oversee its operations as well as undertake the duties of his existing position.
- 11 On 19 April 2002 the respondent gave the applicant an offer of employment document for the Operations Manager position with BC and E (Exhibit A10). The applicant stated that he did not sign this offer for the Operations Manager position at this time because he did not agree with what he was being offered by the respondent. On 22 April 2002 the applicant received a call from a Human Resources Department officer asking him why he had not signed the document. He advised this person that as he had worked over the weekend he had not had time to read the document.
- 12 At the applicant's instigation a meeting was convened on 26 April 2002 between the applicant, the respondent's Manager Employee and Workplace Relations Ms Kathleen Drimatis, Mr Brian McLatchie Administration Manager of Catering and Entertainment and Mr Philip Thow Executive General Manager Catering and Entertainment (Mr Cullen's manager) in order to discuss the applicant's concerns. Exhibit A9 is the applicant's file note of this meeting. The applicant told the respondent at this meeting that his work load was too heavy, the hours he was working were too long and as Mr Cullen was on leave and unavailable from 12 April 2002 to 6 May 2002 this put further pressure on the applicant. The applicant also requested that the lack of administrative support be addressed. The applicant stated at this meeting that Mr Pat Pearce, who was appointed to the events manager position did not have as heavy a work load as the applicant and he told the respondent that it was unfair for him to be expected to take on two jobs and extra responsibilities and at the same time not be paid any extra money. When the applicant was informed by Mr Thow at this meeting that his salary would be frozen for two years, he told the respondent that not only was he disappointed and shocked that his salary had been frozen, he was unhappy about the way in which the respondent had reviewed his salary and determined that he was being overpaid in his existing position. He also stated that he was concerned that he had no opportunity to have input into the process used by the respondent to review his salary. The applicant stated that Ms Drimatis then offered to provide him with a copy of the criteria used by the respondent to determine his salary level. The applicant waited for the information from Ms Drimatis about his salary review however Ms Drimatis did not give him any documentation confirming the way in which the respondent reviewed his salary. Several weeks later Mr Cullen and Ms Lee asked him why he had not signed the offer of employment given to him on 19 April 2002. The applicant told them that he was still waiting for the criteria about how his salary was reviewed to be provided to him by Ms Drimatis. Subsequent to this conversation the respondent informed the applicant that he would not be given a copy of the criteria used by the respondent to formulate his salary level.

- 13 On 13 June 2002 the applicant met with the respondent and he again stated that he would not sign the contract for the Operations Manager position and he advised the respondent that he wanted to remain in his previous position. As the applicant had been working in the Operations Manager position for some time he was aware of the demands of the position. He claimed that the position had an excessive work load, he was experiencing difficulty in coping with the demands of the new position and there was to be no salary increase for undertaking the additional duties. Matters were brought to a head at this meeting when the applicant requested that the respondent advise him of its position given his comments. Ms Lee wrote to the applicant on 14 June 2002.

“Dear Terry

Further to our meeting held on Thursday, 13 June 2002, in which Darryl Cullen was also present, I confirm the following.

- Your position as Theatre Manager with Burswood Resort (Management) Limited [“BR(M)L”] is redundant effective Friday, 21 June 2002.
- You have been offered suitable alternative employment in the capacity of Operations Manager with Burswood Catering and Entertainment Pty Limited (“BC&E”).

If you wish to accept this offer of employment, please sign the contract of employment provided to you and forward to Human Resources as soon as possible.

Should you choose not to accept BC&E’s offer of employment, your employment with BR(M)L will cease as at Friday 21 June 2002 at such time we would request the return of any items belonging to Burswood including your ID badge, staff card and car parking card to Human Resources.”

(Exhibit A11)

- After receiving this letter the applicant continued working with the respondent until 21 June 2002. At termination the applicant was paid his normal wages up to 21 June 2002 and he was given a termination pay advice confirming payment of his long service leave and annual leave entitlements, annual leave loading and three weeks’ pay in lieu of notice (Exhibit A12).
- 14 After termination the applicant applied for about 12 positions which involved running entertainment venues. Exhibit A13 is a copy of the venues contacted by the applicant. As the applicant was unsuccessful in obtaining employment in this area he commenced taxi driving on night shift in November 2002. Between November 2002 and June 2003 the applicant earned approximately \$20,000.00 gross (Exhibit A14). The applicant gave evidence that he did not receive any income until November 2002. Even though he established an entertainment business and he has undertaken some small jobs his business was currently operating at a loss.
- 15 The applicant gave evidence that his termination has had a major personal impact on him. His reduced income since being terminated has led to stresses in his life. He has the pressure of a family to support as well as a mortgage to pay and he had limited job prospects given the lack of entertainment venues in Perth and his lack of formal qualifications. He stated that he has had medical treatment for stress and that his doctor had recommended that he undergo counselling. He stated that the period subsequent to his termination was the most stressful period in his life and as a result pressure was put on his marriage. Working night shifts in his new position has led to lifestyle problems and being self employed had an impact on his ability to spend time with his family.
- 16 In cross-examination the applicant was asked if he was aware if there was a notice provision in his contract. The applicant understood that there was no specific notice period in his contract. The applicant was asked if he would be expected to give a month’s notice to the respondent if he was to resign. The applicant stated that out of respect for the respondent he would give a month’s notice but as he had been employed for 16 years he would talk to his manager and to the human resources section to come to some agreement. He also stated that he would expect to be given one month’s notice by the respondent.
- 17 It was put to the applicant that he was offered additional support to assist him in undertaking the position of Operations Manager. The applicant agreed that even though this was the case Staging Connections still needed managing and overseeing. The applicant stated that when he commenced the duties of the Operations Manager position he was undertaking the duties of the theatre manager, the technical services manager and the technical service co-ordinator positions. He stated that he was unhappy about being on a reduced salary and he again stated that he was unhappy that the respondent had not provided him with the details of the review the respondent undertook confirming the salary of the Operations Manager position. He confirmed that Ms Drimatis reassessed the Operations Manager’s salary but the salary remained the same.
- 18 The applicant confirmed that he was initially offered the position of Operations Manager on or about 22 March 2002 at a meeting with Mr Cullen and he was aware at this time Mr Gaff had been made redundant effective 29 March 2002. The applicant confirmed that he commenced carrying out the duties of the Operations Manager position on 25 March 2002. He stated that it was not until the respondent restructured its operations in 2002 that he was aware that the respondent was reviewing his salary or that a new salary review system had been implemented by the respondent.
- 19 The applicant stated that at the meeting held on 13 June 2002 with the respondent he was not given any opportunity to negotiate alternatives to termination. He was also informed at the meeting that he would not be eligible for a redundancy payment as the respondent was offering him suitable alternative employment and he confirmed that he was told that he would be made redundant if he did not accept the Operations Manager position. The applicant confirmed that on 14 June 2002 he was given notice by the respondent that if he did not accept the position of Operations Manager he would be terminated.
- 20 It was put to the applicant that he had been given two to three months to negotiate his situation with the respondent. The applicant maintained that he was not given any opportunity to negotiate the salary or conditions of the Operations Manager position. The applicant stated that he did not accept the Operations Manager position because the position was not the same or similar to his existing position and because the salary was unacceptable. The applicant was also concerned about the demands of the Operations Manager position. As the applicant had undertaken the Operations Manager position for approximately two months by this stage he was aware of the increased work load involved with this position over and above his existing position. It was put to the applicant that as the respondent was no longer involved in entertainment and catering the applicant could not expect to continue being employed by the respondent. The applicant agreed that even though this was the case he understood that he was to be offered an equivalent position with B C and E and this did not happen.
- 21 In re-examination the applicant stated that it was his opinion that the current duties of the Operations Manager position are not the same job that he was expected to undertake as Operations Manager. For example, the applicant was aware that Mr Pearce was undertaking theatre manager duties which the applicant previously undertook. The applicant also re-iterated that he did not have any discussions or negotiations with the respondent about the Operations Manager position prior to being required to undertake this role.

- 22 Mr Gaff worked alongside the applicant as the respondent's technical services manager for a period of five years. He was employed by the respondent for approximately 15 years until he was made redundant at the end of March 2002. Mr Gaff was informed by the respondent on 22 March 2002 that his position was redundant and he was given one week's notice of termination. He was informed in March 2002 that the respondent would pay him a redundancy package as well as all entitlements owing to him. Mr Gaff stated that his redundancy package was increased after negotiations with the respondent. Mr Gaff stated that at the time he was made redundant his workload was extreme. His role included both internal and external client liaison for all of the respondent's operational departments including the Burswood Dome and Theatre. His department supplied technical staff for all events, he managed staff training and he was responsible for health and safety issues and the day to day running of his section.
- 23 Mr Gaff was asked if one person could do both his job and that of the applicant's former position of theatre manager. Mr Gaff stated that even with a contractor undertaking technical services co-ordination, which was being put into place prior to his termination, one person could not successfully undertake both jobs. He stated that this contractor only covered the duties of the technical services co-ordinator which had been made redundant by the respondent. Under cross-examination Mr Gaff reiterated that if the existing workloads of both his former position and the applicant's position remained the same, even with a contractor being used to undertake technical service co-ordination one person could not do both jobs. It was put to Mr Gaff that some of the Operations Manager's duties could be delegated. He stated that even though this was possible not many duties could be delegated as existing employees already had their own duties to undertake and fewer people were available to undertake additional duties due to the respondent's restructure.

#### The Respondent's evidence

- 24 Mr Thow is employed by BC and E and he has held his position since November 2001. He was recruited to set up BC and E and as part of this process he reviewed the respondent's food, beverage and entertainment section. In February 2002 Mr Thow asked Mr Cullen to review the areas under his control with a view to restructuring his section. As a result of this process Mr Cullen recommended that the roles of dome manager and theatre manager be combined and then split with one person responsible for operational management and the other events management. Mr Thow confirmed that around this time meetings were held with all of the respondent's employees to explain their transfer to BC and E.
- 25 Mr Thow stated that as a result of the restructure in Mr Cullen's area three positions were made redundant in March 2002 - that of the technical services manager, technical services supervisor and the administration manager. It was his understanding that the functions of the technical services manager and the technical services supervisor were totally outsourced to Staging Connections and that the applicant's role in the new position of Operations Manager would only be to oversee this contractor. Mr Thow stated that it was his view that it was possible that the applicant could adequately fulfil his existing position and oversee the technical services contractor. Mr Thow also understood that the applicant had sufficient staff to whom activities could be delegated.
- 26 Mr Thow confirmed that he attended a meeting with the applicant in late April 2002 which was held to discuss the Operations Manager position and the applicant's concerns about this position. He was aware that the respondent's Human Resources department had reviewed the salary of the Operations Manager position and a decision was made that the salary for this position should be less than what the applicant was currently being paid. As the applicant highlighted at this meeting that some functions involved in the new position had not been given sufficient weight, Mr Thow asked Ms Drimatis to review the Operations Manager's salary. He understood that notwithstanding this review there was no change to the salary. He did not recall Ms Drimatis saying at this meeting that she would give the applicant a copy of the criteria for assessing the salary but she did say she would explain to the applicant how the system worked.
- 27 Mr Thow confirmed that after the applicant ceased employment with the respondent Mr Jerry Reinhardt took up the position of Operations Manager. It was Mr Thow's view that Mr Reinhardt has successfully undertaken the requirements of this position. He stated that Mr Reinhardt was currently undertaking the duties of the restructured position as detailed in the duty statement (Exhibit A6) as well as undertaking some of Mr Cullen's duties as Mr Cullen had since resigned and had not been replaced.
- 28 Mr Thow stated that he had an expectation that he would receive or give three months' notice on resignation or termination. He stated that for staff in a similar position to the applicant one month's notice would be usual.
- 29 Under cross-examination Mr Thow confirmed that he had a provision in his contract for three months' notice to be given by either side. He confirmed that no timeframe was given to the applicant about when he could expect to receive a salary increase if he took on the Operations Manager position. It was put to Mr Thow that Mr Cullen did not consult with managers in his section who would be affected by the restructure. Mr Thow stated that he asked Mr Cullen to speak to managers in his area and inform them of what was happening, but he agreed that he did not know if these discussions took place.
- 30 Mr Thow was asked to comment on any differences contained in the job descriptions of the Operations Manager position (Exhibit A6) and the applicant's previous job description (Exhibit A5). Mr Thow agreed that the managerial functions of the technical service manager role were incorporated into the Operations Manager position (transcript pages 161 to 162).
- 31 Mr Thow confirmed that at the meeting held on 26 April 2002 the applicant stated that it was not possible for one person to undertake the duties required of the Operations Manager position, that he was working too many hours and that he was concerned about the lack of administrative support. Mr Thow confirmed that the applicant stated that he was unhappy that Mr Cullen had gone on leave for three weeks during this time. Mr Thow agreed that he was aware that the applicant was concerned about the salary level attached to the Operation Manager position.
- 32 Mr Thow stated that in the past year Burswood Theatre's revenue had increased between seven to ten percent.
- 33 Under re-examination Mr Thow stated that there were minor increases in the applicant's responsibilities when undertaking the role of the Operations Manager and that some of the duties of the Operations Manager position were just an extension of the applicant's existing duties.
- 34 Mr Reinhardt is currently employed by BC and E as Operations Manager and he has held this position since 2 September 2002. He has had approximately 32 years experience in the entertainment industry. Mr Reinhardt confirmed that the contents of Exhibit A6 detail his current job description. His role is to manage and oversee technical productions within the catering and entertainment department. This primarily involves working with productions at the Burswood Theatre, Dome and the Convention Centre. He oversees contractors, suppliers and staff involved in the events taking place at the Burswood Resort's premises. Mr Reinhardt confirmed that since Mr Cullen's resignation his duties are now being undertaken by himself and Mr Pearce. Mr Reinhardt stated that he was working between 10 to 16 hours per day depending on which events were taking place. It was his view that one person can undertake his existing job as long as duties were appropriately delegated and efficient communications used.

- 35 Under cross-examination Mr Reinhardt agreed that he did not have to do all of the venue bookings as part of his role as he shared bookings, contract and licence agreement duties with Mr Pearce. He stated that box office duties were also delegated to another employee.
- 36 Ms Drimatis has been employed by the respondent since June 1999 and in August 2001 she became the respondent's Manager Employee and Workplace Relations. Her role is to manage recruitment and training, industrial relations, remuneration, reward and recognition for the Burswood group of companies. She also provides advice to managers about these issues. Ms Drimatis was asked to detail the custom and practice relating to the giving of notice on termination or resignation for those employees working with the respondent who are not covered by an award. She stated that for senior management (executive team members) three months' notice was given or required and in the case of managers such as the applicant one month's notice was the custom and practice. She stated that the contents of an extract from the Burswood International Resort Casino Employee Handbook (Exhibit R8) sets out that notice to be given or received is as set out in the employee's contract of employment. Ms Drimatis tendered a standard contract which currently applies to non award employees which confirms that one month's notice is required to be given or received and Ms Drimatis confirmed that this contract came into existence after the applicant commenced employment with the respondent.
- 37 Ms Drimatis detailed the events leading up to the applicant being terminated in June 2002. Ms Drimatis stated that in February 2002 employees were aware that a new department was being created to undertake entertainment and catering work and that the applicant would have been aware as early as March 2002 that his area was being reviewed. She confirmed that on 14 March 2002 briefing sessions were held with the respondent's 700 catering and entertainment employees as the respondent had made a decision to no longer operate in the catering and entertainment industries and employees in these areas were made redundant as at 22 April 2002. Employees were informed during briefing sessions that they would be transferred to alternative positions with BC and E and as alternative employment was being provided no redundancy payments would be made. Ms Drimatis recalled the applicant being at one of the briefing presentations that she gave. She confirmed that the applicant was not formally offered the position of Operations Manager with BC and E until he received the letter from the respondent dated 19 April 2002 (Exhibit A10). She stated that subsequent to the applicant receiving this letter a number of discussions were held with him to deal with his concerns.
- 38 Ms Drimatis confirmed that the applicant did not sign a contract for the Operations Manager position by the due date of 22 April 2002 and that the applicant initiated a meeting with her about his situation which took place on 22 April 2002. The applicant stated that he was unhappy about the respondent's actions and there was a discussion about the effect of the reorganisation on the applicant's secretary. The applicant was concerned that his salary was to be frozen and he was also unhappy about the quantum of the Operations Manager's salary. Ms Drimatis detailed the issues discussed in this meeting in an email to Mr Thow and Mr McLatchie (Exhibit R11). A further meeting took place on 26 April 2002 with the applicant, Mr Thow, Ms Drimatis and Mr McLatchie in attendance. Ms Drimatis gave evidence that the applicant reiterated that he was unhappy with the proposed position as there were too many tasks to undertake. He again stated that he was unhappy about his salary and the way in which it had been determined under the respondent's new remuneration system. Ms Drimatis stated that the applicant was told why his salary was being frozen. It was Ms Drimatis' view that the applicant's major problem at that point was the salary attached to the Operations Manager position as the applicant wanted a \$20,000 salary increase per year to undertake the position. The applicant indicated that finance responsibilities involved in the Operations Manager position had not been adequately taken in to account by the respondent when assessing the Operations Manager's salary. As a result of these concerns Ms Drimatis undertook to reassess the applicant's salary and the applicant was advised that until this issue was resolved the respondent would continue to employ him. On or about 11 June 2002 Ms Drimatis informed the applicant that his salary had been reviewed and he was advised that the respondent was not prepared to change its original assessment. Ms Drimatis understood that other meetings took place with the applicant about his new position in the period April through to June 2002 with Ms Lee from the respondent's Human Resources department and the applicant's manager, Mr Cullen.
- 39 Ms Drimatis was asked why the respondent continued to employ the applicant up to 21 June 2002. Ms Drimatis stated that as the applicant was the only employee who had chosen not to undertake employment with BC and E the respondent decided to discuss his concerns to see whether or not the matter could be settled by negotiation. She stated that as part of these negotiations the applicant raised concerns that his new position could not be undertaken by one person. She encouraged the applicant to at least try the job and request assistance if necessary.
- 40 Ms Drimatis stated that it was not abnormal for the respondent's managers to work more than 12 hours per day given the nature of the theatre and entertainment industry.
- 41 Ms Drimatis stated that it was not possible for the applicant to remain employed after the end of June 2002 because his position was redundant and the respondent was no longer involved in the catering and entertainment functions. She stated that even though notice had been given to the applicant in March 2002 that his job was redundant the respondent paid the applicant three weeks' pay in lieu of notice at termination in addition to the one week's notice that the applicant worked after 14 June 2002. It was put to Ms Drimatis that as the applicant was over 45 years of age he should have been given at least five weeks' pay. Ms Drimatis confirmed that if the applicant was over 45 he was entitled to five weeks' notice.
- 42 Ms Drimatis was unsure of the extent to which the applicant availed himself of the free dry cleaning offered by the respondent and she confirmed that the bonus payment that had previously been paid to the applicant had not been paid to any employee in the previous two years. She stated that the payment of a bonus was discretionary and dependent on the respondent making a profit.
- 43 Ms Drimatis confirmed that the contract dated 18 February 1986 contained the terms and conditions of the applicant's engagement and was the initial written contract of employment applying to the applicant (Exhibit A2). Ms Drimatis confirmed that it was not until 19 April 2002 that the applicant was given a copy of the contract for the Operations Manager position.
- 44 Ms Drimatis agreed that at the meeting held on 26 April 2002 the applicant stated that two people were required to undertake the Operations Manager position. She also agreed at that point that the applicant had been undertaking this new position for approximately one month. She stated that the applicant commented on the fact that Mr Cullen was on holidays at an inopportune time, that Mr Cullen was more of a hindrance than a help and that Mr Cullen was happy for him to fail. The applicant was also concerned about the lack of administrative support being offered to him. She stated that the applicant was advised that if he required any administrative assistance he should have discussions with Mr McLatchie. Ms Drimatis stated that the applicant also raised concerns about his salary being frozen.
- 45 It was put to Ms Drimatis that the applicant was told that he was to be provided with a copy of the criteria for evaluating his salary. Ms Drimatis said that this undertaking was never given to the applicant because the evaluation policy document would not make sense to someone who was not trained in the process. She stated that she explained to the applicant the basis upon which the applicant's salary had been evaluated. Ms Drimatis was asked if any other of the respondent's employees had their salaries frozen since the restructure. She stated that there were six to seven people whose salaries were frozen and she confirmed that at this point their salaries were still frozen.

46 Ms Drimatis confirmed that the applicant was a senior employee and that he managed a number of staff.

#### Submissions

47 The applicant maintains that he was denied a benefit under his contract of employment in relation to notice. The applicant says that he should have been given a period of two years' notice due to the difficulty in obtaining equivalent employment elsewhere and given the authority contained in *Jager v Australian National Hotels Pty Ltd* [1998] TASSC 54. The applicant also relies on the indicia outlined in *Antonio Carlo Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499 in support of this contention.

The applicant argues that as there was no express notice period in his contract of employment an appropriate notice period should be determined by the Commission. The applicant maintains that he was a senior employee who managed a large budget, he supervised at least six full-time and up to a hundred casual employees, he negotiated substantial contracts and he enjoyed the benefit of a significant remuneration package of over \$70,000.00 a year. He was head hunted for his initial position and he had over 16 years of excellent and committed service with the respondent. Alternative employment options for the applicant in Perth were limited. Given these elements the Commission should determine that the applicant is due a significant period of notice. The applicant also argues that the respondent's claim that the applicant was offered suitable alternative employment should not be taken into account when determining the appropriate amount of notice due to the applicant. In any event the applicant argues that the position of Operations Manager did not constitute suitable alternative employment for the applicant.

48 The applicant argues that the respondent repudiated its contract of employment with him by unilaterally changing his duties in March 2002. At the time the applicant was given no option but to take on the Operations Manager role whilst he endeavoured to negotiate a reasonable outcome so that he could remain in this position. In the event there was no agreement between the parties and the applicant accepted the respondent's repudiation of its contractual obligations to the applicant in June 2002. The applicant's employment was then terminated. The applicant argues that when the respondent repudiated its contract with the applicant this rendered his termination unlawful.

49 The applicant claims that the position of Operations Manager was significantly different to the applicant's previous position and the evidence given by the applicant, Mr Gaff, Mr Thow and Mr Reinhardt supports this contention. As Mr Gaff and the applicant had first hand knowledge of the duties entailed in the positions they occupied prior to the restructure then their evidence on the workload of each position should be preferred to that of Mr Reinhardt and Mr Thow. As Mr Cullen was not called to give evidence the Commission should make an adverse finding in relation to the respondent's evidence about the duties of the theatre manager position compared to the duties of Operations Manager.

50 The applicant argues that terminating the applicant in June 2002 was not the only option available to the respondent as the respondent had the capacity to employ the applicant in a different position. However this option was not explored by the respondent.

51 The applicant maintains that the respondent acted unlawfully by not giving the applicant sufficient notice in accordance with the implied terms of his contract of employment. The four weeks' notice given to the applicant did not even meet the requirements of the notice provisions under the *Workplace Relations Act 1996* ("the WR Act"). Further, there was no condition of the applicant's contract of employment that allowed the respondent to pay the applicant in lieu of notice.

52 The applicant submits that the provisions of the *Minimum Conditions of Employment Act 1993* ("the MCE Act") relating to a redundancy situation were breached. When it was made clear to the respondent that the applicant would not accept the Operations Manager position on the terms and conditions offered to him the respondent decided to make the applicant redundant effective 21 June 2002. Discussions were not held with the applicant to canvass alternatives such as working out his notice, undertaking job interviews, possibly negotiating a redundancy payout, accessing outplacement services and training and resumé assistance once the applicant was given notice of his termination. The applicant relies on the authority of *Gary Edward Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 in support of his contention that the MCE Act was breached. When the applicant was terminated he was given no other option but to take the new contract or accept his termination.

53 The applicant argues that given the manner of his termination he has suffered substantial injury over and above that which is normally associated with a termination. The applicant developed medical problems and his relationship with his family was under stress as a result of his treatment by the respondent. As the applicant was a long term dedicated employee this poor treatment was unwarranted and inappropriate. The applicant is thus seeking \$5,000 for injury.

54 The applicant is claiming compensation based on his annual salary of \$68,050.00 plus \$1,950.00 per year in benefits for free dry cleaning, meals and parking. The applicant is also seeking compensation for the loss of superannuation entitlements. The applicant maintains that as his loss is in excess of the six month cap as provided for in the Act then he should be compensated for at least this amount.

55 The respondent submits that the applicant was not unfairly terminated and that he is not due any additional payment for notice. The respondent maintains that it did not repudiate its contract with the applicant as no contract with the applicant remained in place once the respondent decided to make the applicant redundant. As the applicant was effectively made redundant in March 2002 there was no repudiation of the applicant's contract of employment. The respondent also maintains that the applicant was given adequate notice of his termination because he was told on 14 March 2002 that his position was to be made redundant effective 22 April 2002. Further, the applicant did not contest his redundancy as he continued to undertake the tasks of the Operations Manager position.

56 The respondent maintains that throughout the period April 2002 through to June 2002 the main issue raised by the applicant in numerous discussions with the applicant revolved around the salary of the Operations Manager position.

57 The respondent claims that it did not breach the requirements of the MCE Act in relation to redundancy because the applicant was informed in early March 2002 that his position was redundant and numerous discussions took place between March and June 2002 about the applicant's situation. There was no need to canvass alternative employment options with the applicant during these discussions because no other jobs with the respondent existed. The only alternative available to the applicant was the Operations Manager position offered by BC and E.

58 The respondent agreed that even though other employees who were made redundant and did not transfer to BC and E as a result of the respondent's decision to restructure its operations negotiated redundancy packages the applicant was not due any payment for redundancy because the applicant was offered suitable alternative employment with BC and E. Further there was no express provision in the applicant's contract of employment for a redundancy payment to be made.

59 The respondent maintains that the applicant did not suffer any injury as a result of his termination. At no stage was the applicant pressured to sign the new contract offered to him by BC and E and the respondent extended the notice period for negotiations to assist the applicant in taking up the position offered to him. In adopting this time frame the respondent took into account the applicant's lengthy employment history with the respondent. The respondent maintains that if it is found that

the applicant's termination was unfair then the loss can only be for that period that allowed the employment to have been brought to an end lawfully.

- 60 The respondent argues that the applicant was given proper notice when he was terminated. The respondent submits that the evidence demonstrates that the giving of one month's notice is the custom and practice for the respondent's managers. The Commission should also take into account that the applicant agreed that one month's notice would be appropriate on termination or resignation. It was further submitted that whilst the applicant's own assessment as to reasonable notice is not conclusive it should be accepted by the Commission (*Westen v Union Des Assurances De Paris* 88 IR 295 at 265). The Commission first needs to consider industry custom and practice and in the absence of this then the indicia outlined in *Antonio Carlo Tarozzi v WA Italian Club (Inc)* (op cit) is to be considered. The offer of employment with BC and E should also be a consideration. The respondent maintains that if custom and practice is not accepted then three months' notice is the maximum period that should be awarded. The respondent argues that the test of what a reasonable person would expect to receive should also be applied when assessing adequate notice.
- 61 The respondent argues that there is no evidence before the Commission that a payment in lieu of notice could not be made.
- 62 The respondent argues that the applicant's remuneration package should not take into account bonus payments and free dry-cleaning and other benefits as no bonus payments have been made in the previous two years and it was unlikely that bonuses would be paid in the future. The respondent maintains that it is difficult to quantify dry cleaning and other benefits that the applicant is claiming. Further these benefits were not taken into account when the applicant was paid out at termination. The respondent concedes that superannuation is to be considered as part of the applicant's remuneration package and can be taken into consideration for loss.

### **Findings and Conclusions**

#### **Credibility**

- 63 I listened carefully to the witnesses whilst they were giving evidence. In my view each witness gave their evidence honestly and to the best of their recollection. On this basis I accept the evidence given in these proceedings. The main issue in dispute related to the workload involved in the Operations Manager position offered to the applicant. In this regard I place more weight on the evidence of the applicant and Mr Gaff in preference to Mr Thow and Mr Reinhardt's assessment of the workload and duties of the Operations Manager position. The applicant and Mr Gaff both worked in their respective positions for many years and the applicant worked in the Operations Manager position from March 2002 to 21 June 2002. In my view the applicant and Mr Gaff would have been in the best position to assess the demands of the Operations Managers position compared with Mr Thow and Mr Reinhardt's judgement. I also take into account Mr Thow had only recently commenced employment with BC and E at the time the applicant was terminated and that the evidence was clear that Mr Reinhardt was not undertaking the same duties as the applicant when he undertook the Operations Manager position.

- 64 I turn now to the principles in relation to these matters and my findings and conclusions.

#### **Is the Applicant due a Benefit under his Contract of Employment?**

- 65 In an application for contractual benefits under s.29(1)(b)(ii) of the Act, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under his or her contract of employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).
- 66 The applicant is claiming a payment of two years' notice which the applicant maintains is appropriate to be implied into his contract of employment given that there was no express notice period contained in the applicant's contract of employment. The applicant relies on the authority of *Jager v Australian National Hotels Pty Ltd* (op cit) and *Antonio Carlo Tarozzi v WA Italian Club (Inc)* (op cit) in support of this claim.
- 67 It was not in dispute that the applicant had no express notice period under his contract of employment with the respondent and that when the applicant was terminated his notice period was determined by the respondent with no discussion with the applicant. Where there is no express period of notice provided for in a contract of employment, a period of reasonable notice is to be implied into the contract of employment. His Honour the President stated in *Antonio Carlo Tarozzi v WA Italian Club (Inc)* (op cit) at 2501:

- "1. Cohen v Nichevic [1976] WAR 183 is authority for the proposition that if a contract of service was silent on what notice was given, then the servant was entitled to reasonable notice and what was reasonable notice was, in every case, a question of fact.
2. Macken, McCarry and Sappideen "The Law of Employment" (3rd Edition) seemed to indicate a slightly different proposition. It is expressed in the following manner:-
  - (a) The length of notice required to put an end to a contract may be specified or implied. If it is not, then the notice given must be reasonable.
  - (b) Reasonableness is determined at the time notice is given, not at the time the contract is made (see *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2QB 556 at 581).
3. Thus, where no length of notice is specified, it may be implied, and this will be a matter of construction of the contract.
4. Possibly, a specific length of notice ascertained by reference to custom or trade practice may be found to exist, but more usually the only implication available will be that reasonable notice to terminate must be given.
5. In this case, the only implication available was that reasonable notice would be given.
6. The rule as to what is reasonable is not rigid and the fact that one month's notice might have been required to be given by the Secretary, does not mean that the same notice is to be given by the Club (see the observations of Jacobs J in *Thorpe v South Australian Football League* (1974) 10 SAR 17.
7. Evidence of industry practice or customs will be material.

There is, however, no evidence of that here, save and except that the Federal award, which applies to lesser paid jobs, provides notice of one month. There is some evidence that one month is not sufficient for this position. What is reasonable notice will depend on the circumstances of the case and one cannot place too great a reliance on particular instances.

12. It seems, on a consideration of the authorities, that the following matters may be relevant factors:

- (a) The high or low grade of the appointment.
- (b) The importance of the position.
- (c) The size of the salary.
- (d) The nature of the employment.
- (e) The length of service of the employee.
- (f) The professional standing of the employee.
- (g) His/her age.
- (h) His/her qualifications and experience.
- (i) His/her degree of job mobility.
- (j) What the employee gave up to come to the present employer (eg a secure longstanding job).
- (h) (sic)The employee's prospective pension or other rights.

13. In this case the following factors are relevant:-

- (a) Mr Tarozzi was 42 years of age.
- (b) He gave up a secure job.
- (c) He was not in that job longitude.
- (d) His length of service with the respondent was not longitude.
- (e) He had professional degrees and qualifications.
- (f) His salary was a middle management salary.
- (g) Whilst his qualifications were of a middle management type, his position, to all intents and purposes, on the evidence, was not a middle management position. He was effectively the Manager of an enterprise.
- (h) There was no evidence that he lost any pension or other right by his dismissal.

14. In the circumstances, taking all of those factors into account, reasonable notice would have been three months.”

68 The respondent led evidence that the custom and practice for its senior employees was that one month's notice is to be given or received on termination or resignation. I note that even though that may be the custom and practice for managers employed by the respondent, what constitutes reasonable notice will depend on each individual's circumstances.

69 When assessing the amount of notice which should have been due to the applicant, and taking into account the criteria set out in *Antonio Carlo Tarozzi v WA Italian Club (Inc)* (op cit) I find that it would have been reasonable for the applicant to have been given six months' notice by the respondent. I base this assessment on the following factors which I find to be relevant in this case. The applicant was 47 years of age at termination which is an age where an employee may experience difficulty in obtaining alternative employment. He worked for the respondent for an extensive period, approximately 16 years. The applicant received a remuneration package commensurate with a senior management position and he was employed in a position which was an integral part of the respondent's operations. The applicant was a very experienced and successful employee and his services were clearly appreciated by the respondent as he had been consistently rewarded with regular salary increases and bonuses. The applicant was sought out for his initial position with the respondent and the applicant did not have a high degree of job mobility given the small size of the theatre/entertainment industry in Western Australia. In my view these factors point to a reasonable period of notice of six months being due to the applicant

70 I therefore find that the applicant is owed a period of six months' notice less the one month's notice already paid to the applicant.

#### Was the Applicant Unfairly Termination?

71 The applicant argues that the respondent repudiated its contract of employment with the applicant when the respondent unilaterally altered the applicant's duties in March 2002. Even though the applicant was expected to undertake the duties of the Operations Manager position between March 2002 and June 2002 I accept the respondent's argument that this was done in the context of the applicant's existing position becoming redundant in March 2002 and the respondent's view that the applicant would be able to meet the demands of the Operations Manager position. I also accept that the respondent and the applicant agreed to negotiate the terms and conditions and the duties of the Operations Manager position during this period. As the applicant accepted this time frame within which to discuss the prospect of undertaking employment with BC and E in the position of Operations Manager it is my view that the respondent did not repudiate its contract with the applicant in March 2002. At the end of the period of negotiation it became clear that no agreement was going to be reached thus it was appropriate in the circumstances that the applicant's existing position be made redundant and the applicant terminated.

72 When the applicant was terminated in June 2002 it was common ground that he was terminated due to a redundancy situation. Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and Other v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). If a decision is made to make an employee redundant based on the operational requirements of the company that can be a valid reason for the dismissal. In this case I am of the view that the applicant was terminated for a valid reason. It was not in dispute that the respondent restructured its operations in early 2002 and as a result the respondent abolished all positions in the areas of food, beverage and entertainment, including the applicant's position of theatre manager. In the circumstances I find that the applicant was terminated due to a genuine redundancy situation.

73 Having said that it is appropriate to consider any unfairness in relation to the process used in effecting the applicant's redundancy, as well as all of the circumstances surrounding the applicant's termination of employment having regard to s.26 of the Act. The question to be determined by the Commission is whether the legal right of the respondent to dismiss the applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (*Undercliffe Nursing*

*Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

- 74 The provisions of Part 5 of the MCE Act are implied into the applicant's contract of employment. A failure to comply with the mandatory requirements under s.41 of the MCE Act is a factor to be taken into account in deciding whether a dismissal is unfair (*Gilmore v Cecil Bros and Ors* (1996) 76 WAIG 4434, per the President at 4445). See also *WA Access Pty Ltd v Vaughan* (2000) 81 WAIG 373 at 378 and cases cited therein).
- 75 Section 41 of the MCE Act provides
- “41. Employee to be informed**
- (1) Where an employer has decided to —
- (a) take action that is likely to have a significant effect on an employee; or
- (b) make an employee redundant,
- the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
- (2) The matters to be discussed are —
- (a) the likely effects of the action or the redundancy in respect of the employee; and
- (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
- as the case requires.”
- 76 Section 43 of the MCE Act provides
- “43. Paid leave for job interviews, entitlement to (sic)**
- (1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.
- (2) The 8 hours need not be consecutive.
- (3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.
- (4) Payment for leave under subsection (1) is to be made in accordance with section 18.”
- 77 Section 41 provides that where an employer has decided to make an employee redundant the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made of the redundancy and discussions are to be held with the employee about the likely effects of the redundancy and measures that may be taken to avoid or minimise its effect. I do not accept the respondent's argument that as the applicant was informed in early March 2002 that his existing position was redundant and as numerous discussions were held with the applicant about undertaking the new Operations Manager position then the requirements of s.41 were satisfied. In my view the requirement to hold discussions with the applicant about the effect of the redundancy and measures to be undertaken to avoid or minimize the effect of the redundancy were not met. The evidence was clear that no specific discussions were held with the applicant about the effect on him of being made redundant and alternatives to redundancy were not canvassed once the decision was made by the respondent in mid June 2002 to terminate the applicant due to a redundancy situation. Even though the respondent endeavoured to assist the applicant in coping with the Operations Manager position between March 2002 and June 2002 these discussions did not address the overall impact of the redundancy on the applicant. The applicant was informed on 14 June 2002 that his employment with the respondent was to be terminated and that he was to cease working with the respondent on 21 June 2002, which is a very short time frame. Apart from the applicant taking up the position of Operations Manager no other options or alternatives were canvassed with the applicant. Redeployment or retraining options were not canvassed, nor was the applicant given any opportunity to discuss accessing outplacement services or financial planning once the respondent made a final decision to terminate the applicant. Even though the respondent argued that it was no longer operating in the entertainment industry in which the applicant was employed this does not mean that the required consultation and discussions should not have occurred. For this reason, I consider that to the extent the applicant was not consulted in relation to his dismissal and relevant discussions were not held with the applicant once a decision was made to terminate the applicant effective 21 June 2002 then his termination was unfair. Further, as a result of the applicant only being given one week's notice of his termination s.43 of the MCE Act was unable to be complied with as the applicant was unable to avail himself of paid leave to attend for job interviews during this short period that he remained working with the respondent. I therefore find that in this respect the applicant was also treated unfairly.
- 78 I have already found that the applicant should have been given six months' notice when he was terminated in June 2002. Even though the respondent argues that the applicant was aware in March 2002 that his position with the respondent had been abolished and that he was to undertake employment with BC & E in the Operations Manager position I find that the applicant was not specifically advised by the respondent that he was to be terminated until 14 June 2002. Prior to this date both the applicant and respondent were involved in discussions with a view to the applicant taking up the new position offered to him by BC & E. From March 2002 to 13 June 2002 both the respondent and the applicant continued working on the basis that problems the applicant had with the duties of the Operations Manager position and the salary for this position may have been satisfactorily negotiated. In the event this did not occur. In the circumstances it is my view that the applicant was given his notice of termination on 14 June 2002 and as the applicant ceased employment with the respondent on 21 June 2002 this period of notice was clearly inadequate. This lack of notice also contributed to the unfairness of the applicant's termination.
- 79 I find that the respondent acted unlawfully when it terminated the applicant on 21 June 2002 by the giving of three weeks' pay in lieu of notice. There was no capacity for the respondent to pay the applicant three weeks' pay in lieu of notice at termination as there was no provision in the applicant's contract of employment allowing for this payment to be made. *Sanders v Snell* [1998] HCA 64 at [16]; 196 CLR 329 at 337 Gleeson CJ, Gaudron, Kirby and Hayne JJ is authority confirming that where there is no condition in an employee's contract of employment for payment in lieu of notice to be made the employer is in breach of its contract with the employee if the employer does not allow an employee to work out his or her notice of termination. As the applicant was unlawfully given a payment in lieu of notice I find that this contributed to the applicant being unfairly terminated.

- 80 The respondent argued that as the applicant was offered suitable alternative employment which he declined there was no necessity for the applicant to be given a redundancy payment. The respondent also maintains that in any event the applicant had no entitlement to a redundancy payment as this entitlement was not an express term of the applicant's contract of employment. The test for determining whether alternative employment offered to an employee constitutes suitable alternative employment is an objective one (*Clothing & Allied Trades Union of Australia v Hot Tuna Pty Ltd* (1988) 27 IR 226). In applying an objective test to this circumstance it is my view that the factors that require consideration are whether the new position to be performed is within the same range of duties previously undertaken by the applicant and whether the terms and conditions of employment for the applicant's existing and new position are similar. I find that the duties of the Operations Manager position were not within the same range of duties expected of the applicant in his previous position. I accept the evidence given by the applicant and Mr Gaff that the position of Operations Manager which was offered to the applicant entailed a significant increase in the duties required of the applicant over and above the duties expected of the applicant in his existing position. These additional tasks which were expected of the applicant were also confirmed by Mr Thow. Based on the evidence and my views on witness credit I find that the Operations Manager position incorporated a significant amount of duties involved in Mr Gaff's technical services manager position. Even though Mr Reinhardt gave evidence that the Operations Manager position was manageable I accept the applicant's evidence that his current duties are not the same as the duties required of the Operations Manager when the applicant undertook this role from March 2002 until he was terminated on 21 June 2002. I also note that Mr Reinhardt works an excessive amount of hours per day (between ten to sixteen hours) in order to undertake the Operations Manager role. Even though the technical services co-ordinator's duties were allocated to a contractor the Operations Manager position still required the contractor to be supervised which in my view would have formed a substantial part of the duties required of the Operations Manager position.
- 81 I find that the conditions of employment attached to the Operations Manager position were not similar to or the same as the applicant's existing position. I have reached the view that the remuneration attached to the Operations Manager position was not equal to the applicant's existing remuneration. Even though the applicant was to be paid the same salary for the Operations Manager position as he had been paid in the position of theatre manager, the Operations Manager's salary was to be frozen for an unspecified timeframe as a result of the respondent applying its new salary review formula. The applicant was paid bonuses in his existing position and even through Mr Thow gave evidence that BC and E had been operating profitably since its inception employees whose salaries were frozen had not had their salaries increased nor were employees paid a bonus since March 2002. I accept the applicant's evidence that up to early 2002 his salary was regularly reviewed and increased using a process which was both consultative and transparent. The applicant was also regularly paid bonuses for meeting targets. There was no evidence from the respondent confirming that the applicant would receive free dry-cleaning, parking and meals in the Operations Manager position. On this basis I have reached the view that the applicant would therefore be receiving a reduced remuneration package in the Operations Manager position to that of his existing position.
- 82 I thus find that the position of Operations Manager which was offered to the applicant in March 2002 did not constitute suitable alternative employment for the applicant.
- 83 When the respondent wrongly decided that the Operations Manager position constituted suitable alternative employment the applicant was deprived of the ability to negotiate a redundancy package, which in my view constitutes a substantial unfairness towards the applicant. Even though there was no express term of the applicant's contract of employment for an entitlement to a redundancy payment the respondent confirmed that the applicant was denied the opportunity to negotiate a suitable redundancy payment on the basis that the respondent had the view that the Operations Manager position constituted suitable alternative employment. When the respondent decided that suitable alternative employment was unavailable for other employees at this time these employees were able to negotiate a redundancy payment.
- 84 In all of the circumstances I find that the applicant was terminated unfairly. He was not given a fair go all round.

#### Injury

- 85 The notion of injury must be treated with some caution. In *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849 Coleman CC and Smith C observed at 2862:
- "It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299)."
- 86 In my view the applicant has suffered some injury over and above that which is normally associated with a termination. The applicant had given many years of loyal service to the respondent and was clearly committed to remaining employed with the respondent which was demonstrated by the applicant's efforts to meet the extensive and onerous demands of the new Operations Manager position. In the event, despite working long hours the applicant was unable to meet the demands of this position and was given one weeks' notice before leaving his employment with the respondent. I find that the respondent's very poor handling of the applicant's termination, the short notice he was given, the lack of due process in effecting his redundancy, combined with the suddenness of the applicant's termination contributed to the applicant being stressed as a result of his termination and needing to seek out medical assistance. I accept that the industry within which the applicant worked is a small industry and there is thus a limited likelihood of finding alternative employment at short notice thus putting further pressure on the applicant's health. I accept the applicant's evidence that his health and family relationships suffered significantly as a result of the way his termination was handled and that this stress was over and above that normally associated with an unfair termination. In the circumstances it is my view that the application should be awarded \$1,000 as compensation for injury.

#### Compensation for Unfair Dismissal

- 87 I now turn to the question of relief in this case.
- 88 The applicant does not claim reinstatement and in my view, given the particulars of this case reinstatement is impracticable. It is clear on the evidence that the applicant has satisfied the onus on him to seek out alternative employment.
- 89 The respondent failed to comply with Part 5 of the MCE Act. As a result the applicant was deprived of the opportunity to discuss alternatives to termination, to negotiate a redundancy package and to avail himself of the opportunity to explore re-training and financial assistance. Further, the applicant has, as I have already noted, been deprived of the ability to avail himself of the statutory right under s.43 of the MCE Act to paid leave of absence for the purposes of attending job interviews. I consider the applicant's loss to be a period to enable the matters in Part 5 of the MCE Act to be attended to including the possible negotiation of a redundancy package, which I find in this case to be a period of four weeks. This period should have been available to the applicant prior to being given notice of termination and is thus to be paid in addition to the notice I have

determined is due to the applicant. In assessing this timeframe I take into account the nature of the respondent's operations and the extensive range of options, possible retraining and resources that the applicant could have canvassed and accessed. The applicant is also claiming payment for loss of superannuation payments and additional benefits quantified at \$1950 per annum. I find that the applicant should be compensated for the loss of superannuation payments and the additional benefits normally due to him under his contract of employment with the respondent.

- 90 The parties are to confer within seven days of the date of this decision to agree on the amount to be paid to the applicant in light of these reasons for decision.

2004 WAIRC 10860

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TERRY PATRICK CRANSWICK	<b>APPLICANT</b>
	-v-	
	BURSWOOD RESORT (MANAGEMENT) LIMITED	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE OF ORDER</b>	WEDNESDAY, 10 MARCH 2004	
<b>FILE NO/S</b>	APPLICATION 1299 OF 2002, APPLICATION 1094 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10860	

**Result** Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement. Application for contractual benefit allowed.

*Order*

WHEREAS on 19 December 2003 the Commission issued Reasons for Decision in this matter and the parties were required to confer within seven days of the date of the decision to agree on the amount to be paid to the applicant in light of the reasons for decision; and

WHEREAS as no agreement was reached between the parties as to the amount to be paid to the applicant the Commission set the matter down for hearing on 23 February 2004 to hear from the parties in relation to the amount to be paid to the applicant; and

WHEREAS on 23 February 2004 the applicant's representative advised the Commission that he was unable to attend the Commission on that day due to illness and the hearing was vacated and the parties were directed to provide submissions in writing by the close of business 24 February 2004 and any submissions in reply by 25 February 2004; and

WHEREAS on 25 February 2004 the respondent's representative provided submissions as to the amount to be paid to the applicant and requested leave to reopen its case to make additional submissions in relation to the amount to be paid to the applicant taking into account the duty on the applicant to mitigate his loss; and

WHEREAS no submissions were received from the applicant; and

WHEREAS on 2 March 2004 a Minute or Proposed Order issued; and

WHEREAS on 4 March 2004 the respondent requested a Speaking to the Minute of Proposed Order; and

WHEREAS on 9 March 2004 the Commission conducted a Speaking to the Minutes of Proposed Order; and

WHEREAS on 9 March 2004 the applicant's representative advised the Commission by facsimile that he was not able to attend the hearing on that date and the Commission was of the view the hearing should go ahead as no adjournment was sought by the applicant and the Commission did not believe that it was appropriate in the circumstances to delay this matter any further; and

WHEREAS the respondent argued that the Commission should deal with the request it made on 25 February 2004 to reopen its case to hear submissions about mitigation in relation to the applicant's claim for a denied contractual benefit given this request was made prior to the minute of proposed order issuing; and

WHEREAS the applicant argued in its facsimile to the Commission dated 9 March 2004 that there was no basis for leave to be granted for the respondent to reopen its case at a speaking to the minutes; and

WHEREAS after hearing from the respondent on the issue of reopening this matter the Commission formed the view that there was the opportunity during the hearing of this matter for the issue of mitigation and its impact on any amount to be awarded to the applicant to be canvassed and as there was no compelling reason given by the respondent to convince the Commission that this application should be reopened to hear further from the parties on this issue the Commission refused the respondent's application to reopen its case; and

WHEREAS the respondent confirmed that the correct payment for superannuation in relation to the compensation component of the proposed order was \$430.78 and requested an amendment to reflect that appropriate tax was to be paid on the amounts ordered; and

WHEREAS the Commission was of the view that point two in the minute of proposed order should be amended to reflect the change in superannuation and that references to the appropriate taxation being paid would also be added; and

HAVING HEARD Mr A Randles (of counsel) on behalf of the applicant and Mr D Jones (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

- 1 DECLARES THAT the dismissal of Terry Patrick Cranswick by the respondent was unfair and that reinstatement is impracticable.
- 2 ORDERS the respondent to pay Terry Patrick Cranswick compensation in the sum of \$6,815.48 gross less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 within seven (7) days of the date of this order.
- 3 DECLARES that the respondent denied Terry Patrick Cranswick a benefit under his contract of employment.

- 4 ORDERS the respondent pay Terry Patrick Cranswick \$29,166.60 gross less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 within seven (7) days of the date of this order.

[L.S.]

(Sgd.) J L HARRISON,  
Commissioner.**2003 WAIRC 08839**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PATRICIA JILL DAVIES & PHILIP ERIC THOMSON	<b>APPLICANTS</b>
	-v- BUNBURY CITY COUNCIL	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 25 JULY 2003	
<b>FILE NO/S</b>	APPLICATION 1246 OF 2002 & APPLICATION 1247 OF 2002	
<b>CITATION NO.</b>	2003 WAIRC 08839	
<b>Result</b>	Order issued	
<b>Representation</b>		
<b>Applicant</b>	Mr A Johnson as agent	
<b>Respondent</b>	Mr C Garvey of counsel	

*Order*

HAVING heard Mr A Johnson as agent on behalf of the applicants and Mr C Garvey of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

- (1) THAT applications 1246 and 1247 of 2002 be and are hereby joined and will be heard and determined together.
- (2) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
- (3) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than fourteen days prior to the date of hearing.
- (4) THAT the parties file and serve upon one another any signed witness statements in reply upon which they intend to rely no later than 7 days prior to the date of hearing.
- (5) THAT the applicants and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.
- (6) THAT the applicants and respondent file an agreed statement of facts (if any) no later than three days prior to the date of hearing.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.**2004 WAIRC 10606**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PATRICIA JILL DAVIES & PHILIP ERIC THOMSON	<b>APPLICANTS</b>
	-v- BUNBURY CITY COUNCIL	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	MONDAY, 2 FEBRUARY 2004	
<b>FILE NO/S</b>	APPLICATION 1246 OF 2002 & APPLICATION 1247 OF 2002	
<b>CITATION NO.</b>	2004 WAIRC 10606	

<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Applicants validly entered into their contracts of employment – Intent of parties considered – Applicants had entered into contracts of employment for a specified period of time – Contracts came to an end by effluxion of time – No duress or undue influence – No dismissal at the initiative of the employer – Commission lacks jurisdiction – Applications dismissed – <i>Industrial Relations Act 1979 (WA) s 29(1)(b)(i)</i>
<b>Result</b>	Applications dismissed. Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr A Johnson as agent
<b>Respondent</b>	Ms C Crawford of counsel

*Reasons for Decision*

- 1 These are two applications pursuant s 29(1)(b)(i) of the Industrial Relations Act 1979 (“the Act”). Both applicants are former employees of the respondent and complain that they were harshly, oppressively and unfairly dismissed on or about 30 June 2002.
- 2 The respondent denies that it treated either applicant unfairly, and moreover, says that neither applicant was dismissed, in order to attract the Commission's unfair dismissal jurisdiction.
- 3 The applicants were represented by Mr Johnson of the Municipal Employees Union. Ms Crawford of counsel appeared for the respondent.

**Factual Background**

- 4 Both applicants, Ms Davies and Mr Thompson gave evidence, as did two managers of the respondent, Ms Snooke the human resources manager, and Mr Budgen, the manager parks and recreation.
- 5 These matters have some history, which is broadly as follows. Ms Davies commenced employment as an animal attendant at the Big Swamp Wildlife Park (“the Park”) which is located on a reserve in the City of Bunbury. Ms Davies entered into a contract of employment described as a “workplace agreement” for a part time wildlife park attendant. It was common ground that the “workplace agreement” was not registered pursuant to the Workplace Agreements Act 1993 and thus, had no legislative effect. This agreement had a nominal expiry date of 30 June 2000, although by clause 2.3, the terms and conditions continued to apply until a replacement agreement was reached. On or about 30 June 2000, Ms Davies signed a further contract of employment, in the same or similar terms to her first contract, which contained a nominal expiry date of 30 June 2001. Again, although described as a “workplace agreement”, this agreement was not registered. Both of these agreements described Ms Davies as employed “part time”. Apparently, Ms Davies was to share her hours of work with another wildlife attendant, since deceased.
- 6 Mr Thompson commenced employment on a casual basis as an animal attendant at the Park on or about 16 December 1999. He remained casually employed until about November 2001, from which time events became contentious.
- 7 It would appear that relevant events for present purposes commenced in or about April 2001, when negotiations took place between the respondent and representatives of the applicants, in relation to their terms and conditions of employment. These matters on the evidence, concerned rates of pay and conditions of employment for both applicants. Apparently, on the evidence, those negotiations led to recognition by the parties, that relevant terms of the Municipal Employees (Western Australia) Award 1999 (“the Award”) and the City of Bunbury (Municipal Employees) Agreement 2001 (“the Agreement”) had application. Both the Award and the Agreement are instruments having effect under the Workplace Relations Act 1996 (Cth).
- 8 It was common ground that during all of this time, there was some speculation as to the ongoing viability of the Park. Evidence from the respondent, in particular from Mr Budgen, was to the effect that the Park’s ongoing viability had become a contentious matter within the respondent’s council, culminating in a resolution to close the Park, which was subsequently revoked following ratepayer dissent. It was Mr Budgen’s evidence, that because of the uncertain status of the Park, the respondent only offered fixed term employment arrangements to animal attendants, including the applicants.
- 9 In conflict with this, Ms Davies evidence was that she was always assured that her contracts would be “rolled over”, and that they were somewhat of a “formality”. Her evidence was she thought she would have ongoing employment. I pause to observe however, that this was not the evidence of Mr Thompson. His evidence was that he was never told by the respondent that his contracts would “roll over” or go beyond their nominal expiry dates.
- 10 Relevant events occurred towards November 2001 for present purposes.
- 11 Ms Snooke sent to both applicants under cover of a memorandum dated 2 November 2001, copies of offers of employment and a position description. It was the evidence that the offers of employment, appeared to take into account, the negotiations that had taken place concerning the applicant’s terms and conditions of employment, between about April and November 2001. Both offers of employment to the applicants, contained a heading “Position Status” which was in the following terms:
 

*“Your appointment to this position is temporary (fixed-term) for a period of twelve months (12) months from Monday 2 July 2001 until Sunday 30 June 2002.*

*This Offer of Employment does not constitute an offer of permanent employment.*

*At the expiration of this period, your employment will be terminated, unless otherwise agreed in writing between the City and yourself.”*
- 12 According to the evidence of Ms Snooke, she had further discussions with Ms Davies regarding her offer of employment. Confirmation of those discussions in relation to various matters, including her starting date, was contained in memoranda from her to the applicants dated 2 and 8 November 2001 respectively. It would appear on the evidence, that either on or some time prior to 12 November 2001, there was a further meeting at the Park between the applicants and Mr Budgen and Ms Snooke, to discuss the offers of employment. On the evidence, the actual date of this meeting was not clear, with Ms Davies suggesting it was on 12 November and Mr Thompson suggesting it was prior to 4 November. Mr Budgen could not recall exactly when this meeting took place in November 2001, but did testify that he was concerned at the lapse of time in concluding the

contracts. He said that the reason the meeting was called at the Park, was because the seven day period specified in the offers of employment for their acceptance, had lapsed by several weeks.

- 13 Ultimately, by letters dated 12 November, both applicants wrote to the respondent and indicated that they were "happy to accept" the offers of employment from the respondent and indicating that they had signed the necessary documents. These letters also referred to the rescission of earlier letters from the applicants that had apparently declined the offers of employment. Those earlier letters were not in evidence.
- 14 It was common ground that on 30 June 2002, the applicants' contracts of employment came to an end. This was foreshadowed, in a memorandum from Mr Budgen to the applicants, dated 25 June 2002.
- 15 Ms Davies testified that after the termination of her employment, another person was engaged to carry out duties that she was previously performing at the Park. In the case of Mr Thompson, he testified that after his employment came to an end, some months later, he was requested by Mr Budgen to perform some weekend shifts at the Park which he did. Additionally, in December 2002 and in June 2003, the respondent engaged Mr Thompson on a casual basis, in the Park.
- 16 Both applicants testified that at the meeting which occurred at the Park in November 2001, immediately prior to their signing the contracts of employment, they were pressured to do so because of a reference by Mr Budgen to alternative employment arrangements for the Park, if neither applicant accepted the offers of employment. This was described by Mr Budgen, according to the applicants, as "plan B".

### Consideration

#### Offers Validly Accepted?

- 17 An issue that arose in the course of the hearing of the matters that needs to be dealt with is whether the offers of employment to the applicants were validly accepted by the applicants to form binding contracts of employment. The offers of employment to both applicants required that if they were to be accepted, the applicants were to return a signed duplicate copy of the offer to the respondent's human resources department "within seven (7) working days of the receipt of this letter". The offer went on to provide that "Should a return contract not be received or alternative negotiations not have commenced within the above-specified time, this offer of employment will be declared null and void."
- 18 It is for the offeror in any contractual negotiation, to be able to specify the terms upon which an offer is to be accepted. If terms are however specified, such as a time limit for acceptance, then compliance with those terms is required. A purported acceptance that does not comply with the term will be of no effect and is incapable of acceptance: *Nyulasy v Rowan* (1891) 17 VLR 663 (FC); *White Cliffs Opal Mines Ltd v Miller* (1904) 4 SR (NSW) 150 [21 WN (NSW) 55]; *Spencer's Pictures Ltd v Spencer Cosens* (1918) 18 SR (NSW) 102 [35 WN (NSW) 38] (FC).
- 19 The position in relation to each applicant in this respect was different. In the case of Ms Davies, the evidence was and I find that the original offer was sent to her by Ms Snooke on 2 November 2001, according to Ms Snooke's evidence by internal mail. It was her evidence that it would have been received that day or the next. However, some six days later Ms Snooke had discussions with Ms Davies about the terms of the offer and another memorandum was sent to Ms Davies, again it seems by internal mail, dated 8 November 2001. This letter of offer contained the same provision for acceptance within seven days. Whilst it constituted a variation to the original offer sent on 2 November, I am prepared to accept for present purposes, that it was intended by the respondent to constitute a fresh offer, given the terms of the covering memorandum specifying acceptance of it within seven days of receipt of "the letter". Assuming that the memorandum was received by Ms Davies on 9 November 2001, the last date for acceptance, to be effective, was 16 November 2001.
- 20 Ms Davies acknowledged her assent to the terms of the revised offer by letter dated 12 November 2001 (exhibit R4 p 59). This was received, according to the evidence of Ms Snooke, on 13 November, evidenced by her notation on the top right hand corner of the letter. A copy of the offer of employment, signed by Ms Davies, appears at tab C of exhibit A2, bearing the date of 12 November 2001. There was no evidence however, of when the signed copy was received by the respondent's human resources department, as required in the offer. I am prepared to conclude however, that Ms Davies letter of acceptance, received within time, constituted sufficient communication of acceptance of the offer for the purpose of forming a contract of employment between the parties: *George Hudson Holdings Ltd v Rudder* (1973) 128 CLR 387.
- 21 The position with Mr Thompson is less clear. He was provided the offer of employment in the same terms as that given to Ms Davies and at the same time, that is 2 November 2001. However, on the evidence, there was no further negotiation with Mr Thompson as to his terms and conditions of employment, as was the case with Ms Davies. Mr Thompson, as with Ms Davies, sent a letter to the respondent dated 12 November 2001 accepting the respondent's offer of employment, which was attached to the memorandum from Ms Snooke dated 2 November 2001. A copy of the offer, signed by Mr Thompson and also dated 12 November 2001, was contained in exhibit R4 at 69. Self evidently, the period between the date of the offer being received in the ordinary course of events and the receipt of the letter of acceptance from Mr Thompson by Ms Snooke, was outside of the seven day time limit specified in the respondent's offer to Mr Thompson.
- 22 As noted above, there was evidence before the Commission that between the offers of employment being sent to the applicants and their acceptance of them on 12 November, a meeting took place at the Park. As the Commission has already observed, the date of this meeting was uncertain on the evidence. Mr Budgen said he wanted the meeting to get a response from the applicants on the offers as the matter had dragged on for some time, in his view.
- 23 Counsel for the respondent Ms Crawford, submitted that the Commission should draw an inference from these events that the respondent, in requesting a response from the applicants on the offers, and subsequently continuing the employment of the applicants on the revised terms, was impliedly extending the time for acceptance beyond the seven day period specified in the offers.
- 24 Considering this issue, I do not consider that over the period from the date of the offers to their acceptance there were on the evidence, any "negotiations" as referred to in the last paragraph of the offers to extend the period for acceptance. However, on balance, the process of meeting at the Park to elicit a response to the offers from the applicants and the subsequent application of the terms of the offers to the applicants in their employment, does enable an inference to be drawn that at least by implication from that conduct, the respondent was either extending the time for acceptance of the offers or alternatively, re-offering the contracts on the same terms as set out in the original offers.
- 25 Accordingly, I consider that the applicants validly entered into their contracts of employment with the respondent on or about 12 November 2001.

#### Terms of Employment

- 26 The first issue to determine, is the terms and conditions of the applicants' contracts of employment. Mr Johnson submitted that the contracts of employment, as executed in November 2001, to the extent that they provided for a fixed term of

employment, were inconsistent with the terms of the Award. It was submitted that the Award, as the submission went, referred to full time, part time and casual employment contracts, with the contract of service clause providing specific notice provisions. Mr Johnson submitted that this federal instrument covered the field in so far as the applicants' employment was concerned, and any inconsistent terms in their contracts of employment were of no effect.

- 27 For the following reasons, I am not persuaded by these submissions. It is trite to observe that an award or industrial agreement will only operate on and upon a contract of employment once formed: *Gapes v Commercial Bank of Australia Ltd* (1980) 37 ALR 20 per Smithers and Evatt JJ at 23. There is no automatic incorporation or implication of terms of an award into a contract of employment: *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410.
- 28 On their face, the contracts of employment entered into by the applicants with the respondent in November 2001, were for a finite period to 30 June 2002. From a consideration of the relevant provisions of the Award, there is nothing in it which would indicate the preclusion of contracts of employment for a finite term. There is conceptually a distinction to be drawn, between the status and category of employment, as either full time, part time or casual on the one hand and the duration of that category of employment. Moreover, clause 10.1.5 of the Award, in my opinion, expressly contemplates contracts of employment of a fixed duration, when it specifies that the period of notice in the contract of employment clause of the Award, "shall not apply in the case of dismissal for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, or in the case of casual employees, or employees engaged for a specific period of time or for a specific task or tasks." There is nothing in the Agreement which would seem to alter this position.
- 29 I am not therefore satisfied that the terms of the applicants' contracts of employment, were inconsistent with either the Award or the Agreement, for present purposes.
- 30 Furthermore, whilst the parties variously described the applicants' contracts as "fixed term contracts", as a matter of law in my view, they were not. The Award applied to the employment of the applicants, which contains a notice of termination of employment clause. The operation of that clause cannot be ousted by any contract to the contrary. That is, in my opinion, the applicants' contracts were better described as contracts for a finite duration, otherwise terminable on notice in accordance with the Award, at any time prior to 30 June 2002.

#### **Was There a Dismissal?**

- 31 The question of there being a "dismissal" for the purposes of applications invoking this part of the Commission's jurisdiction is essential. This matter was considered by the Commission as presently constituted in *Gallotti v Argyle Diamond Mines Pty Ltd trading as Argyle Diamonds* (2002) 82 WAIG 3011. In that matter, the Commission as presently constituted concluded that an employee who entered into a fixed term contract voluntarily and being aware that the duration of the employment was finite, was not "dismissed" for the purposes of the Act. The Commission's conclusions in this decision were upheld on appeal to the Full Bench and the Industrial Appeal Court: *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) 83 WAIG 919 (FB); (2003) 83 WAIG 3053 (IAC).
- 32 On the evidence I am satisfied and I find that in the case of Mr Thompson, he accepted the respondent's offer of a fixed term contract for 12 months, as it gave him some security of employment over and above his previous casual engagements. In my opinion, there is no reason to doubt that the contract of employment expressed as it was and as set out above, is not able to be relied upon for its full terms and effect. The language of the offers of employment, in relation to duration, was plain and unambiguous.
- 33 In relation to Ms Davies, I have some difficulties accepting her evidence where it conflicted with the respondent, on her level of understanding of the offer, and her assertion that she had a guarantee of ongoing employment. In my view, her evidence in this respect was at odds with the dealings between the applicants and the respondent, over the months between April to August 2001. During this time the respondent had indicated to the then representative of the applicants, the Australian Services Union, the reasons why fixed term contracts of employment were being offered. It is certainly understandable on the evidence that the applicants may have been disappointed with this, given their prior involvement at the Park and obvious dedication to animal welfare. However, the fact remains in my opinion, that the offers of employment ultimately accepted by the applicants, were plainly for a fixed duration of 12 months and on 30 June 2002, those contracts came to an end by effluxion of time
- 34 In these circumstances, there was no dismissal of either applicant, in order to attract the jurisdiction of the Commission.

#### **Duress or Undue Influence**

- 35 Finally, I deal with the submissions of the applicant that there was some form of duress put upon them in relation to entering into the final contracts of employment. This submission was based upon allegations that the respondent, in particular through Mr Budgen, had exerted undue influence and pressure on the applicants to accept the offers of employment. Reference was made to evidence concerning a "Plan B" referred to by Mr Budgen, noted above, if the applicants did not accept the offers of employment.
- 36 The concept of duress in contractual negotiations at common law is well settled. For there to be duress, rendering a contract void or voidable, there needs to be evidence of the procuring of contractual assent by some form of illegitimate threat or undue pressure. The existence of pressure alone in commercial relations does not constitute duress as recognised at common law, as pressures of this kind are part of everyday commercial activity. The pressure must be by its nature, illegitimate. In my opinion, employment relationships are not to be distinguished in this general sense. (See Lindgren, Carter and Harland *Contract Law in Australia* ch 13 and *Chitty on Contracts General Principles* 27th Ed ch 7).
- 37 In the present case, the evidence is and I find that in the period between April and November 2001, intermittently, there were negotiations between the applicants and the respondent in relation to their terms and conditions of employment. The circumstances of Mr Thompson and Ms Davies however, were different. In the case of Mr Thompson, up until his acceptance of the offer of employment in November 2001, he was casually employed by the respondent. Ms Davies however, was employed up to 30 June 2000 and to 30 June 2001, on what were essentially part time contracts of employment, containing a nominal expiry date but which continued beyond that date until new arrangements were entered into. In her case, in my opinion, her employment was effectively continuous from the time of its commencement until the employment came to an end on 30 June 2002.
- 38 Despite this however, I am not persuaded that on the evidence, the negotiations between the respondent and the applicants involved any form of duress that would make the agreements voidable. In the case of Mr Thompson, the entering into the contract in November 2001 conferred upon him the benefit of security of employment for the following year, which he did not enjoy as a casual employee. This was his evidence. I also am satisfied, again on his own evidence, that he was happy to accept the arrangement, because it also improved his remuneration.
- 39 In the case of Ms Davies, considering her evidence overall, it is important to recognise that the new arrangement led to backdated wage increases for her and other benefits. This was a direct result of negotiations which had take place prior to

November 2001. These negotiations were solely for the benefit of the applicants. Whilst I accept that the respondent may well have indicated to the applicants that it needed their decision on the offers of employment or other arrangements would need to be put in place, this in my opinion, taken in the context of the entire history of the matter, does not constitute duress or undue influence. It is also important to observe that at all material times, the applicants had assistance by way of representation by at least two unions. Presumably, they took advice and made their own decisions as to the offers by the employer, in the light of that advice and assistance.

- 40 Whilst in some circumstances in a case of ongoing employment, there may well be duress or undue influence brought to bear to vary contractual terms or to terminate one contract and procure another, which may indeed involve a breach of contract, in the present circumstances, I am not persuaded to the applicants' point of view.

#### Conclusion

- 41 Whilst I have no doubt as to the applicants' commitment to the welfare of the animals at the Park, that they enjoyed their roles at the Park and were disappointed to not be given permanency in employment, I am not persuaded on all of the evidence, that there have been dismissals to attract the jurisdiction of the Commission in these cases.
- 42 Accordingly, the applications are dismissed.

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	<b>2004 WAIRC 10607</b>
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
<b>PARTIES</b>	PATRICIA JILL DAVIES & PHILIP ERIC THOMSON
	<b>APPLICANTS</b>
	-v-
	BUNBURY CITY COUNCIL
	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER
<b>DATE</b>	MONDAY, 2 FEBRUARY 2004
<b>FILE NO/S</b>	APPLICATION 1246 OF 2002 & APPLICATION 1247 OF 2002
<b>CITATION NO.</b>	2004 WAIRC 10607

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicants</b>	Mr A Johnson as agent
<b>Respondent</b>	Ms C Crawford of counsel

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#### *Order*

HAVING heard Mr A Johnson as agent on behalf of the applicants and Ms C Crawford of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the herein applications be and are hereby dismissed.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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	<b>2004 WAIRC 10984</b>
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
<b>PARTIES</b>	PHILLIP DAWSON
	<b>APPLICANT</b>
	-v-
	DEVAUGH PTY LTD ABN 73 008 792 265
	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S WOOD
<b>DELIVERED</b>	FRIDAY, 26 MARCH 2004
<b>FILE NO</b>	APPLICATION 175 OF 2003
<b>CITATION NO.</b>	2004 WAIRC 10984

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<b>Catchwords</b>	Industrial Relations Act 1979 (WA) s.23 and s.29(1)(b)(i) - Termination of employment – Harsh, oppressive and unfair dismissal – Redundancy – Lack of substantive and procedural fairness – Applicant harshly and unfairly dismissed – Reinstatement impracticable – injury – Compensation ordered
<b>Result</b>	Applicant dismissed harshly and unfairly; compensation awarded
<b>Representation</b>	
<b>Applicant</b>	Mr A Randles of Counsel
<b>Respondent</b>	Mr D Jones as agent

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*Reasons for Decision*

- 1 This is an application made pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Mr Phillip Dawson alleges that he was dismissed unfairly and harshly by the respondent, Devaugh Pty Ltd on 14 January 2003. Mr Dawson alleges that there was no valid reason for his redundancy as there was work still to be performed and in addition an employee previously employed by the company was re-employed at the time of his dismissal to perform a job which Mr Dawson says he could have performed. Mr Dawson also alleges that the company ceased to use their cranes in the South-West region so as to make them available for use in Port Hedland for a large contract which they were about to secure. Mr Dawson joined the company in October 1987 and worked for the company continuously as a crane driver from that time. The applicant also says the company did not comply with the requirements of s.41 of the *Minimum Conditions of Employment Act 1993* (MCE Act) and the company did not give adequate notice. It is common ground that the company paid Mr Dawson one week's notice and eight weeks payment by way of redundancy at time of termination. Mr Dawson also claims injury for the adverse effect which his termination has had upon him. The respondent admits that they should have paid the applicant 5 weeks notice in accordance with the *Federal Workplace Relations Act 1996*.
- 2 Mr Dawson's evidence is that he is a qualified crane driver on a range of cranes. Most relevantly he is qualified on the 36-tonne hydraulic, 20-tonne Kato and the 80-tonne Sumitomo crane. He says his duties included crane driving, maintenance repair of cranes and other associated duties in support of other staff when there was no crane work to do. He says he worked within the South-West Region typically within the area around Bunbury. He is involved mostly in commercial construction. He says that during his time with the respondent he trained about six people in crane driving, including training Mr Kohler on the 20-tonne crane. Mr Dawson says that he is qualified up to 80-tonne cranes at the time of his dismissal. He is now qualified for 100-tonne cranes. He is also qualified for excavators, tow trucks and a range of other machinery. He is not qualified for fork lift driving. However, he says he is competent to drive fork lifts. He is not qualified for bobcat driving and he does not have a current first aid certification however, he had previously been certified. His qualifications are displayed at [Exhibits A1, A2 and A3]. He says that although he does not have formal mechanical qualifications he is competent to maintain and repair a variety of cranes and has done so through the course of his employment including with the respondent.
- 3 At the time of his termination he was working on the Silos job in Bunbury. He had started there in August 2002. There were two crane drivers operating, an 80-tonne Sumitomo and a 20-tonne Kato crane. He says by arrangement between themselves Mr Kohler, the other crane driver, and himself operated the two cranes alternately each day. Later in 2002 Mr Kohler left the employment of the respondent to secure better money elsewhere. At that time Mr Dawson operated both cranes by himself.
- 4 At one point in time Mr Dawson and a fellow worker Mr Kenning (a rigger) complained to Mr Keith concerning unsafe practices on the site. His concern was that there were workers working under slung loads and also at height without proper safety provision or safety gear. He says management did not respond to his concerns. However, Mr Jim Murphy an organiser with the CFMEU attended at site and aired his concerns about the safety of workers on site.
- 5 On the morning of 29 November 2002 Mr Dawson says that Mr Clinton Woods advised Mr Vic Kenning and Mr Dawson to report to Mr Phil Sorfleet's office in the main workshop. They were not advised as to what the meeting was about. Mr Sorfleet advised him that he had been told that "there was no more work for us on the Silos site and I was to go on annual leave". Mr Dawson went on leave from that day. Mr Dawson says his attitude to Mr Sorfleet's information was that it was very strange as he had previously been told by the construction manager that there would be crane work on site until the end of February. He says the day he left there was a hire crane at site. He considers that on that day there was plenty of work still available (Transcript p.17). During his annual leave he noticed there were different hire cranes on site at different times. The cranes were from a hire firm United Cranes. Whilst on leave Mr Dawson rang Mr Sorfleet's office three or four times to ask what was happening. Mr Sorfleet indicated there was still no work. Mr Dawson also went to see Mr Sorfleet three times in his office. Mr Sorfleet confirmed there was still no work for Mr Dawson. Mr Dawson returned to work on 13 January 2003. He had been advised to attend work on that day by Mr Sorfleet. Mr Dawson had no more annual leave remaining at that stage. Whilst on leave Mr Dawson also saw the Managing Director, Mr Merv Waugh, and asked him what was happening on the Silos job. He says Mr Waugh indicated that he was not up to date with what was happening in the company. Mr Waugh also asked Mr Dawson what he was going to do with his long service leave. Mr Dawson asked Mr Waugh about a job coming up at Eaton and whether he could go to that job and Mr Waugh replied "No". Mr Waugh said that that job had already commenced. Mr Dawson does not know who did the crane on that site.
- 6 On 13 January 2003 Mr Dawson saw Mr Sorfleet and was taken to Mr Stott's office. Mr Stott at that stage had taken over from Mr Waugh. They discussed whether any maintenance work was required on cranes. Mr Dawson for the rest of the day drove a 36-tonne Coles crane loading steel on to a truck. Mr Dawson says he was supposed to do an inspection on the 20-tonne Kato crane on 13 January but did not have time so he decided to do it the next morning. The crane was at the Silos construction site at that time. At that time the 80-tonne crane was locked up.
- 7 The next morning Mr Dawson was on his way to attend to the crane when he was called back to the workshop and advised to attend Mr Stott's office. Mr Stott advised him to sit down and told him the crane work had run out. Mr Stott indicated that he could not see any more crane work coming up in the foreseeable future. He told Mr Dawson that he would have to lay him off, he would pay him one week in lieu and some redundancy pay. Mr Dawson says there was no other discussion at the meeting and the meeting lasted six or seven minutes. Mr Dawson was advised to go to the pay office, which he did and his pay was already made up. His termination pay details are at [Exhibit A4]. He was given his separation certificate on that morning.
- 8 Mr Dawson says it was common knowledge that the company was seeking a contract in Port Hedland from BHP Billiton. He says he knew that two cranes were going from the Silos site to Port Hedland. These cranes were the 20-tonne Kato and the 80-tonne crane. He says he knew this because:
 

"Well, it was all around the work - - quite a few of the workers were talking about it and the morning I got put off there was - - one of the supervisors that was going to Port Hedland - - he was trying to find me, I was told, and - - because he wanted the log books out of the cranes." (Transcript p.22).

The supervisor's name was Jobsie. Mr Dawson says the talk was that the Port Hedland job would last 9 to 10 months.
- 9 In terms of whether Mr Dawson would be interested in the Port Hedland job he says:
 

"Well, the wife and I had spoken about it previously and - - that's how long we'd known about it before I got put off, there was - - this job had come up, and we'd said that if there's no work around Bunbury that we'd only be too pleased to go to - - Port Hedland, because we'd done that - - we'd taken a caravan and that away before and worked away." (Transcript p.22-23).
- 10 Mr Dawson says that during the week he was put off, Mr Kohler who had gone to Burrup to work and came to see him at Mr Dawson's house in Australind. He says Mr Kohler asked him what was happening. Mr Dawson advised him that he had been

put off and Mr Kohler advised that he had been re-employed on the Friday previous. Mr Kohler indicated that if he had known that Mr Dawson had been put off then he would not have taken the job. Mr Dawson says Mr Kohler indicated he had been asked by the respondent to dismantle the 80-tonne crane and take it to Port Hedland. Mr Dawson was also paid long service leave at the time of his termination. Mr Dawson says his reaction to being terminated was distressful. Mr Dawson since termination has had a job for two weeks for three hours a day. He earned \$600 at this job. He earned also \$400 for two days at a job in Capel. He says it has been hard finding a job because of his age. He has since upgraded his crane certificate to 100-tonne. He has also looked for maintenance work. Mr Dawson tendered a list of jobs [Exhibit A7] which he says are jobs undertaken by the company since his termination.

- 11 Under cross-examination Mr Dawson says that in addition to crane work he would assist others on a plate compactor roller, he would do maintenance work or mechanical work (albeit he does not have a certificate for mechanical work). Mr Dawson says he was required to strip down cranes and do repair work. He says he always had to do repair work on cranes. He says he has not done any repair work on the 20-tonne Kato or the 80-tonne crane. He does not have the skills for the 20-tonne Kato and the 80-tonne Sumitomo never had a lot of work done on it. The cranes he would have done were the older style cranes and not the more technical cranes. Mr Dawson says he has never worked in the North-West of the state. He has always worked within the South-West land division. Mr Dawson says he taught Mr Kohler to operate the 20-tonne Kato but not the 80-tonne Sumitomo crane.
- 12 Mr Dawson also says that he knew that Mr Kohler had a certificate of competency for the 80-tonne crane. He had worked on it for approximately 10 months in Kalgoorlie on the Hall of Fame site. He was capable of stripping down and reassembling the crane for transport. Mr Dawson says that Mr Kohler also later operated the 80-tonne crane at a Mineral Sands Project at Burrekup. After that project the 80-tonne crane went to the Silos project. At the Silos project both Mr Kohler and Mr Dawson would operate the crane day in thereabout. This was until Mr Kohler left when Mr Dawson was the only one who operated the crane.
- 13 Mr Dawson says he does not have a current certificate to operate a bobcat. He does not have a current operator's licence for a forklift. He does not have a current licence for a dogman. He does not have a current first aid licence or certificate. Mr Dawson says he reported some safety issues regarding workers walking under a slung precast beam 7 to 8 weeks prior to going on leave.
- 14 Mr Dawson says that at the time he went on leave he was still doing 50 to 70 lifts a day with the crane. He says there was a hire crane doing lifts as well. He says there was still plenty of work left at that time for a crane. Whilst he was on leave there were contractors doing the crane work. Mr Dawson disagrees that it would have been cheaper for the company to operate the cranes through contractor arrangements. Mr Dawson is not sure whether the cranes in the Eaton Recreation Centre site were hire cranes.
- 15 Mr Dawson says it was common knowledge there was other work in Port Hedland around about 2 weeks prior to when he was laid off. He is sure of this because the day he was laid off there was a foreman looking for him to get the log books for the crane. He was never told of the Port Hedland job and never asked to go to Port Hedland. He did not raise the issue of the Port Hedland work at the time he was made redundant. He was fully prepared to go to Port Hedland.
- 16 In response to whether Mr Dawson has done any concrete work and would be prepared to do it, he says that he had done some previously on and off and it was quite possible that he could have performed that work. Mr Dawson says he is capable of maintaining cranes and other vehicles. He has done this for years. It would only take about two hours to get certified to drive a forklift. He has also supervised men previously. But he has not supervised men whilst in the employment of the respondent. Mr Dawson agrees he does not have all the qualifications of Mr Kohler.
- 17 Mr Dawson says there is quite a bit of construction work going on in South-West but there is no work for him as a crane operator. He has not applied for jobs at the Burrup. He has heard there is work available up there.
- 18 In relation to the projects mentioned in [Exhibit A7] Mr Dawson says some of those projects are finished. He is not clear whether all of them require crane work. However many of them required lifting work.
- 19 Mr Dawson says others had been sent off by the respondent to obtain forklift or bobcat certificates. He says he would have obtained this certificate if he was allowed to. He believes the first aid certificate would take one day to get and he would have obtained the certificate if offered the opportunity.
- 20 Mr James Murphy, a crane driver with Multiplex Constructions, gave evidence that in the second half of 2002 he was an organiser for the CFMEU. He ceased his employment with the union in April 2003. He was responsible as an organiser for the South-West. He has about 20 to 22 years experience as a crane driver and many certificates. In early or mid October 2002 he visited the Silos projects to investigate some safety problems on site. At that time Mr Kohler was driving the 20-tonne crane and Mr Dawson the 80-tonne crane. Mr Murphy was concerned about some unsafe work practices with riggers who were employed by Ultrafloor as subcontractors. Mr Murphy resolved the issues of safety and left the site. He spoke to the crane drivers whilst on site. He says he later got a call from Mr Dawson and Mr Kenning complaining of being mucked around by the company. He says Mr Dawson was complaining that he had been made to go on holidays and the company had brought in crane hire. He says the next thing he heard was that Mr Dawson had been paid off, i.e. his employment had been terminated. Mr Murphy tried to contact Mr Waugh, a son of one of the directors of Devaugh's. He later had a conversation with Mr Stott about Mr Dawson's termination. Mr Stott replied that Mr Dawson was not competent to drive the 80-tonne crane. He questioned Mr Stott about why Mr Dawson was put off when there was other work to be done in Port Hedland. Mr Murphy advised Mr Stott that he was going to take the matter to the Commission for unfair termination. There was then a heated discussion between the two.
- 21 Mr Murphy says it takes a day to do a bobcat course. It takes two days to do a first aid course. In his opinion Mr Dawson would have been more competent on the 80-tonne crane than Mr Kohler. In his experience it would take about six weeks to two months for a job started to organise that job.
- 22 Under cross-examination Mr Murphy says he always found Devaugh's co-operative and the safety issues were corrected. Mr Murphy says there is still a bit of construction work in the Bunbury and South-West region. He said the respondent had a job at Eaton primary school which finished about two months prior to the hearing. Mr Murphy says he mentioned the Port Hedland job to Mr Stott and Mr Stott replied that Mr Dawson was not competent to drive the crane. Mr Murphy challenged this assessment and there was a heated discussion between them. He says it takes two days training to get a forklift ticket. He justifies his opinion that Mr Dawson is more equipped to handle the 80-tonne crane than Mr Kohler because Mr Dawson learnt his skills on the 36-tonne Coles crane, which is a harder crane to operate.
- 23 Mr Victor Kenning gave evidence that he had worked for the respondent for 20 years and 8 months. He left them after the Australia day long weekend in early 2003. His duties were that of a rigger scaffolder. He had certification for scaffolding,

advanced rigging, dogging, elevated work platform, forklift driving, confined space and working with heights. He paid for these tickets himself with the exception of the forklift driving ticket which the respondent paid for. He says it takes about 6 hours to gain this forklift certificate. In the second half of 2002 he says Mr Kohler and Mr Dawson worked on the Silos project and both drove the 80-tonne and 20-tonne cranes. They alternated each day on these cranes. He says that he has seen Mr Dawson perform duties such as shovelling, sweeping, grouting and scaffolding. He has not seen him on a bobcat or a forklift. He has seen Mr Dawson dismantling and assembling cranes. He has also seen him doing mechanical and maintenance work on cranes. Mr Kenning says he expected the work to continue up until the end of February 2003 on the Silos project. He says at the end of November 2002 Mr Dawson was told by Mr Sorfleet that their work had come to an end on that project. Mr Dawson was advised to go on holidays. Mr Kenning went to the South-West health campus. Mr Kenning says he knew about the Port Hedland job before he left the Silos site on 29 November 2002.

24 On the Friday before Mr Dawson was dismissed Mr Kenning says that Mr Kohler rang him and told him that he was coming back to Devaugh. He says Mr Kohler did not tell him what he was going to do when he returned to the respondent's employment. Under cross-examination Mr Kenning says that it takes about two days to get a first aid certificate. He does not believe that Mr Dawson has a dogging ticket. It takes a minimum of a week to get this ticket. He says he questioned Mr Sorfleet about the lack of work. He saw United Crane Hire cranes on site during the period from his discussion with Mr Sorfleet to the time he finished employment with the company. He says that there were no employees of the respondent operating cranes on the site.

25 Mr Terence Stott gave evidence that he was a consultant who had provided consulting services to the respondent and from December 2002 had acted as Chief Operating Officer for the respondent. He took on many other duties formerly done by the Managing Director of the company. Mr Stott says that he is aware that in December 2002 there were two cranes on the Silos project and that the crane work in early December had basically run out. He says together with his management team he did a review of crane requirements in early January and the outlook for crane for the organisation in the Bunbury area. He says the assessment was that there was very limited and only intermittent need for crane for the foreseeable future. That applied to all cranes. He made a recommendation to directors of the company as follows:

"That with respect to Mr Dawson that we apply a retrenchment, with respect to the cranes there was a possibility that the Kato - - sorry, the Sumitomo could go to a major project that we had just secured in Port Hedland but there was no certainty. In fact, I had made the recommendation and in fact put in place the seeking of dry hire for that crane as well, and we also looked at the other cranes and the decision was to park them up and also sell one of the cranes, which was a BHP - to actually sell that" (Transcript p.84).

He was not aware of any crane work required on the Silos project between 29 November 2002 and 14 January 2003 except for some specific requirements performed by contractors. He did a detailed cost analysis of the use of company cranes versus use of subcontractors [Exhibit R2] and demonstrated that significant savings could be achieved.

26 Mr Stott was aware that the company had secured the BHP contract on either 12 or 15 December 2002. The contract was signed on 16 December 2002. That contract was very important for the respondent. The job required approximately 50 to 60 employees. In addition to this approximately 30 to 40 subcontractors were required.

27 In terms of Mr Kohler Mr Stott says:

"My understanding was that Mr Kohler was a very experienced crane operator who had operated the Sumitomo crane from its - - from the time it was delivered to Devaugh and had principally operated it during its life with Devaugh. He also had specific other qualifications with respect to other plant. He was a leading hand and he also had things like a first-aid certificate and was a dogman and fully - - had full comprehensive skills, and also used to working in the north of the state" (Transcript p.90)

28 Mr Stott says Mr Kohler was licensed to operate the 80-tonne crane, was licensed to operate forklift, bobcat, had a senior first aid certificate. He also would be required to look after other machinery, to dismantle, erect and maintain the crane and the 20-tonne crane. Mr Stott says that Mr Kohler was also as part of the job required from time to time to act as a dogman. He was also paid some leading hand rates. Mr Stott says that both he and the project management team did not consider Mr Dawson's qualifications were of the required nature to take on the position offered to Mr Kohler in late January 2003. Mr Stott says that he would not have considered Mr Dawson for the Port Hedland job. He did not have the competencies for that particular position. He denies that Mr Dawson was terminated for any issues to do with complaints over safety issues on the Silos project. Mr Stott says he was not even aware of the situation.

29 Under cross-examination Mr Stott says that the project manager Mr Peter Carley considered the qualifications of Mr Dawson and Mr Kohler. This was done in conjunction with the senior project team. During January they were still working out some technical issues in relation to the proposed construction method for the Port Hedland project. It was not until late January that a final decision was made as to whether the Sumitomo crane would go to Port Hedland. The selection of Mr Kohler was made in late January 2003. Mr Stott says he had discussion with Mr Kohler in early January to see whether he was available. However the decision to put the Sumitomo crane at Port Hedland was not made until late January and the decision to employ Mr Kohler was not made until late January. Mr Stott was advised that Mr Kohler had leading hand capabilities. He was not aware that Mr Kohler had never operated as leading hand whilst with the respondent. Mr Kohler commenced work on 28 January 2003. He agrees that he had rung Mr Kohler several weeks before that and arranged for him to terminate his employment in Karratha and come down and arrange for the Sumitomo crane to be packed up. Mr Stott says he is not sure of the exact timing in terms of whether Mr Kohler was offered the job prior to Mr Dawson's employment being terminated (see transcript p.97-98).

30 Mr Stott says he is not aware of Mr Dawson's experience other than he has a crane ticket. He was advised that Mr Dawson's main function and responsibilities were that of a crane driver. Mr Stott gave evidence about the process he used for considering whether the crane would go to Port Hedland and also whether the crane might be subject to dry hire.

31 Mr Stott says that the decision to terminate Mr Dawson's employment was made on 14 January or within a date of that date. The conversation whereby Mr Dawson was advised of his redundancy was not a long conversation. Mr Dawson's pay had been made up in the pay office. Mr Stott agrees there was no discussion or consultation about the matter.

32 Mr Stott says the competence and the experience of the North-West were major attributes in selecting Mr Kohler for the job (transcript p.110). He does not recall in the conversation with Mr Murphy saying that Mr Dawson was not competent to drive the Sumitomo crane. Mr Stott says that Mr Smith, another employee, was operating the 20-tonne crane in March or April 2003. Mr Smith was also a highly qualified concrete finisher. The Kato crane was taken up to Port Hedland initially on the basis that it would only be used part time. Mr Smith was offered the position primarily on the basis that he was a concrete finisher/ crane driver not the other way around. Mr Stott under re-examination says that he had been advised that Mr Dawson

had operated the Sumitomo crane for a short time on the Silos project. He was not however aware of the informal arrangement between Mr Kohler and Mr Dawson to alternately operate the two cranes. The primary focus of the respondent company is to employ people who are already competent to do their job.

- 33 Mr Duncan Gordon gave evidence that he is employed as a Safety Human Resources Manager with the respondent company and has been employed there since April 1998. There was an incident reporting system on the Silos project. The system is common throughout the building construction industry and also on resource work. He only received one written incident report on the Silos site. It concerned an employee who injured an arm unloading some form of timber from a utility. Mr Gordon has no recollection of a report regarding concrete products being supported from a crane and people walking under that. He did receive a report from Mr Peter Farnell informing him that a union official had visited the site on one occasion. He was advised that the concerns were dealt with to everyone's satisfaction. Mr Gordon gave evidence about the history of the use of the Sumitomo crane by the respondent. The crane was mainly operated by Mr Kohler at various sites. Mr Kohler was the person involved with stripping the crane down and transporting it to the next site. Mr Gordon was involved in the management team that made the decision about sub-contracting the cranes. The final decision was Mr Stott's. He says that operating their own cranes was costing more than sub-contracting the cranes. Mr Gordon cannot remember another project in the South-West land division which required a crane at the time of Mr Dawson's dismissal.
- 34 Mr Gordon says that the contract documents for the Port Hedland job were signed on 16 or 17 December 2002. However with other things to organise it would have been the beginning of January 2003 before final confirmation was received that everything was ready to go. It was the end of January before any major decisions were finally made as to what was going to go to Port Hedland. Mr Gordon says he was involved in consultation with Mr Stott and Mr Carley, who was appointed the Project Manager of the Port Hedland job, as to who they believe was the best person to go to the crane job. There were not many people in Bunbury who worked for the respondent who were actually offered the job at Port Hedland. Mr Gordon says the job that Mr Kohler got was one whereby he had to operate the 80-tonne Sumitomo crane and supervise the personnel in the field in the unloading of materials. Mr Kohler was paid at the senior leading hand rate and was required to do general basic maintenance across light vehicles, provide the project manager with periodic reports on the conditions of the vehicles and operate any other plant equipment to which he was competent. This plant equipment included a forklift and a bobcat. Mr Kohler was also required to do dogging duties. He had to have a first aid qualification. Mr Gordon says that Mr Dawson did not have as many qualifications as Mr Kohler. Mr Gordon does not believe that the job that Mr Dawson was doing on the Silos job was the same as the job that was offered to Mr Kohler in Port Hedland. He says the job in Port Hedland had a broader scope requiring a more extensive range of duties.
- 35 Mr Gordon says in the management team it was discussed many times as to who they would want to go to Port Hedland. Sometime during November they threw around some ideas as to who may or may not be particular candidates to go to Port Hedland. Mr Kohler was considered the best person for the job because of his ongoing operation of that particular crane plus his other skills (transcript p.124). He says Mr Dawson was considered for the job.
- 36 Mr Gordon was asked specifically several times in cross-examination whether Mr Dawson was considered for the Port Hedland job (transcript p.124). In short he answered as follows:
- "You were never asked about Mr Dawson, were you?---I can't specifically recollect that that happened but I was asked to give consideration to who I believed should be the best person to go up, simple as that."
- 37 Mr Gordon was cross-examined about the extent of Mr Dawson's other skills. He says he was aware that Mr Dawson had done some maintenance on cranes. He was not aware of the extent that Mr Dawson may have stripped down and rebuilt cranes. He says that it is possible that Mr Dawson was equipped to handle all the minor servicing of light vehicles. He says that Mr Kohler had leading hand duties on the Mining Hall of Fame job. He is not sure whether he was paid a leading hand allowance. Mr Gordon was not at the Silos site when Mr Dawson went on leave. He was told that Mr Dawson was sent on leave because there was no other work for him and was uneconomic to run the company cranes. The work that was required was performed by contractors.
- 38 Mr Jones on behalf of the respondent submitted that the respondent in November 2002, at the time the applicant was asked to go on annual leave, had reached a decision that it was uneconomic to keep the two cranes on the Silos project, and it was in fact cheaper to have the work done by contract. As a result of this decision the applicant was required to go on annual leave commencing on 29 November 2002. Whilst on leave the work on the Silos project was done by contractors at a cheaper cost. When the applicant returned from annual leave on 13 January 2003 the company was doing no direct crane work. Crane work was all being performed by subcontractors. The company's cranes had been earmarked for the Port Hedland work. The work had been previously tendered for and the contract was won on 16 December 2002. Mobilisation of the crane did not take place until late January or early February 2003. The company did not select Mr Dawson for the Port Hedland job because they did not believe he was the right man for the job. The company believed that Mr Kohler was the right person for the job as it was an important contract for the respondent. Mr Kohler was very familiar with the 80-tonne Sumitomo crane. He was acclimatised to the North-West region having worked up there, he had all the current and relevant tickets required for the leading hand position, namely, he was licensed as a crane operator, a bobcat operator, a forklift operator, a licensed dogman, and he had current competencies in first aid. All of these were requirements for the North-West position. Mr Jones says that Mr Stott complied with all the requirements under the award and the *MCE Act*. The respondent says that the job in Port Hedland was completely different from the one they were working on in the Bunbury region. The company simply gave the job to who they considered to be the best person for the job. Mr Dawson was paid one week's notice which was the requirement under the Engine Drivers' (Building and Steel Construction) Award, and Mr Dawson was also paid redundancy payment of 8 weeks. This is also an award requirement. Mr Jones submits on behalf of the respondent that the company should have paid Mr Dawson 5 weeks notice as per the Federal *Workplace Relations Act 1996* and submits that the company will attend to that payment.
- 39 Mr Jones on behalf of the respondent submits Mr Kohler was the person who operated 80-tonne Sumitomo crane almost continuously for the respondent until it arrived on the Silos project site. At that time both Mr Kohler and Mr Dawson interchanged operation of the two cranes. He submitted that the job to be done in Port Hedland was not the same as the job to be done on the Silos project. The Silos project involved mainly crane operation. Port Hedland job involved a range of duties including the operation of bobcats, forklift, dogging and the need for a first aid certificate. The job also involved leading hand supervision and the maintenance of light vehicles. Mr Kohler was simply a better person for the job in Port Hedland than Mr Dawson.
- 40 Mr Jones submitted that the definition of redundancy in the award is: "a situation where an employee ceases to be employed by an employer respondent to this award, other than for reasons of misconduct or refusal of duty." Mr Jones says this is more beneficial than the definition in the *MCE Act* which is: "No longer required by an employer to continue doing a job because the employer has decided that the job will not be done by any person." Mr Dawson's job was made redundant on 14 January 2003

- because the company did not require a person to operate cranes on that job, i.e. the Bunbury job. Mr Dawson was not considered for the Port Hedland job because he did not have the required current certificates.
- 41 Mr Jones says the point is not that Mr Dawson could have obtained the certificates. The company when they were considering the man for the job wanted persons who were fully competent then and there. The company enquired about Mr Kohler's availability in early January. Mr Kohler already had all the competencies required. The contract was very important to the company. In relation to the 20-tonne Kato crane, this required only intermittent usage. Mr Smith who got that job was mainly concerned with concrete finishing. Mr Jones submitted that the onus is on the applicant to prove that the dismissal was unfair on the basis that Mr Dawson was a better man for the Port Hedland job. He says that Mr Dawson was also not acclimatised to the North-West. Mr Jones says that as per the decision in *Undercliffe Nursing Home -v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch 65 WAIG 385* the test is whether the employer has abused his rights to terminate the contract of employment and that is not the case. Mr Jones also refers to the decision of the Industrial Appeal Court in *Gromark Packaging v Federated Miscellaneous Workers' Union of Australia WA Branch 73 WAIG 220* concerning the selection of employees.
- 42 Mr Jones submitted that the Port Hedland job is a different job and at a later date. It is not the function of the Commission to deal with an unfair refusal to employ a person in another job. The Commission is restricted to dealing with whether the dismissal was in any way unfair. At the time of dismissal there was no further work in the Bunbury area and it was uneconomic to keep the operation of the cranes within the company.
- 43 Mr Randles in his closing submission says that Mr Dawson was a long time employee with the respondent. He was experienced as a crane driver and performed a range of other tasks including maintenance work on cranes, mechanical work on a variety of cranes, general mechanical work and he had also driven the forklift previously and had previously held a first aid certificate. Mr Stott was engaged in September on a consulting basis and made some recommendations. As a result of his recommendations a decision was made to stop using the respondent's cranes and Mr Dawson was sent on leave on 29 November 2002. When he returned from leave on 13 January 2003 he did some limited work and then was dismissed for reasons of redundancy on 14 January 2003. Mr Randles says that the business decision to lock up the respondent's cranes on the Silos site was because of their requirement to use it in Port Hedland not because they were uneconomic. The evidence of Mr Stott that those cranes were uneconomic was unconvincing given the ongoing monthly cost of maintaining the cranes. Namely the hire purchase payment of \$12,500 per month. Mr Randles submitted that the business decision was to lock the cranes in Bunbury so that they would be rapidly available for the Port Hedland job. Mr Stott's evidence should be disregarded because his answers were unsatisfactory in that he had lapses of memory when put under pressure. He then refused to answer questions at times. Mr Randles submitted that the evidence of Mr Kenning and Mr Dawson shows there was still work ongoing at the time when Mr Dawson was required to take annual leave. Mr Dawson gave evidence about other jobs that required crane usage. Mr Randles submitted that it can only be speculated that these jobs used subcontractors. Mr Randles says there was plenty of crane work around in Bunbury but the respondent had made the decision to send its cranes to Port Hedland so Mr Dawson's employment had to be terminated. That is not a valid reason for termination.
- 44 Alternatively, Mr Randles submitted that even if the Commission accepts there was a basis for terminating Mr Dawson's employment in Bunbury because of lack of sufficient work, then Mr Dawson should have been the person sent to Port Hedland. The company knew from at least as early as 12 December 2002 that they had secured the contract and Mr Stott contacted Mr Kohler in early January to see if he was interested in the Port Hedland position. Mr Kenning and Mr Dawson say that Mr Kohler was in Bunbury some days before Mr Dawson's employment was terminated.
- 45 Mr Randles submitted that the issue is not one of selection processes between employees. The issue is one where a long standing competent and conscientious employee had his employment terminated six days prior to another person being engaged to do a job at higher wages. In his view it is a ridiculous proposition to suggest that Mr Dawson if he was considered for the job in Port Hedland would have to crane drive and perform dogman tasks at the same time.
- 46 Mr Randles submitted that the inescapable conclusion is the respondent never considered Mr Dawson for the position in Port Hedland. The obligation is upon the respondent to discuss alternatives with the employee. There was no discussion whatsoever with Mr Dawson about the effect of the proposed changes on his employment. The presence of safety issues on site and Mr Dawson's complaints about those played a part in his termination. Mr Dawson's age also had a part to play in his termination albeit there was no evidence about that. There was ample time to train up Mr Dawson if the respondent had any real concerns about his lack of certification. Mr Randles submitted further that Mr Dawson was injured by his manner of his dismissal which showed complete contempt for an employee of 15 ½ years. He had never been terminated in his life and he was humiliated. He had used up his entire leave entitlements. Mr Randles says that if the Commission uses Exhibit A6 and multiplies that to a 12 month figure then the gross annual figure is \$40,993.83. That is the appropriate figure that should be used for calculation for compensation because it represents the actual earnings of Mr Dawson. The figure should then be grossed up for superannuation as per *Eleanor Angela Keane v Lomba Pty Ltd 78 WAIG 810*. The figure grossed up including superannuation is \$44,273.34. Mr Randles submits that Mr Dawson is entitled to the maximum compensation. Reinstatement is not practicable.
- 47 The issue of credibility of witnesses is not a significant issue in this matter. However, having said that I would favour the evidence of Mr Dawson to that of Mr Stott. These are the two main witnesses for the applicant and the respondent respectively. Mr Dawson was very straightforward in his evidence and convincing and I accept his evidence. There is one exception to this and his evidence needs to be treated cautiously in relation to whether there was continuing work for the respondent within the Bunbury region. He refers to projects which the respondent had secured. It is not clear to me which of these projects were scheduled after his termination or the extent of crane work required on any of them. Indeed it is not clear that Mr Dawson had adequate knowledge of these projects upon which he could give reliable evidence. I would regard his evidence in respect of these projects as Mr Dawson having surmised that work was still available rather than a more factual account. The evidence of Mr Murphy and Mr Kenning was equally straightforward and was undiminished in cross-examination. The evidence of Mr Stott and Mr Gordon was less direct and responsive to questions under cross-examination. However, my impression of their evidence at hearing, and having read the transcript in detail, is that their evidence can be relied upon notwithstanding some reluctance to provide direct responses to questions. However, I also have an area of reservation about the evidence of Mr Stott. This relates to the timeline for making decisions. He says that due to technical reasons which related to the method of construction he did not decide to take the 80 tonne Sumitomo crane to Port Hedland until the end of January. Yet he offered a contract to Mr Kohler for the crane driver's job in Port Hedland on 20 January 2003 (Transcript p.107). He had in early January spoken to Mr Kohler about his availability for the job. For a man who from his evidence was clearly cost conscious, these actions would appear inconsistent. Clearly there were a range of decisions or factors to be weighed at that time, however, it is probable that the timing of Mr Kohler's engagement was because he needed to dismantle and transport the crane in readiness for the Port Hedland job.

- 48 The provisions of s.41 of the *MCE Act* are part of Mr Dawson's contract and if not complied with his dismissal may be deemed unlawful, but that does not necessarily mean that his dismissal is unfair (*Garbett v Midland Brick Company* 83 WAIG 893). Whether the dismissal of Mr Dawson was unfair in all the circumstances is dependent upon whether there was a fair go all round (*Undercliffe* (op cit)). In this particular matter the prime issue in my mind is whether Mr Dawson should have been offered the job in Port Hedland instead of Mr Kohler. Mr Kohler being an ex-employee who had worked with Mr Dawson at the Silos job in Bunbury.
- 49 Mr Randles on behalf of the applicant challenges the evidence of Mr Stott as unreliable and submits that the Commission should find that it is improbable that the company could decide that it was more economic to use subcontractors for their crane work than to use their own cranes. He submits that the costs contained in [Exhibit R2] cannot be believed as the respondent continued to carry a \$12,500 hire purchase cost on the cranes each month. He says instead the Commission should find that the cranes were in fact parked up ready to go to Port Hedland for the BHP Billiton contract. He submits also that there was work continuing for cranes at the Silos project and in the South-West (refer to Exhibit A7). This he says is the uncontradicted evidence of Mr Dawson and Mr Kenning. Mr Stott's evidence is that there was only intermittent work remaining for cranes on the Silos project and this work was undertaken by subcontractors. The same applied to other jobs which the respondent was doing or had plans to do in the South-West. It is Mr Dawson's evidence that he did all of the crane work after Mr Kohler resigned. The number of crane lifts required did diminish prior to his going on leave. He was aware that subcontractors were doing crane work on the Silos site whilst he was on leave. It is the case that the evidence about the amount of remaining work is in dispute. But equally I believe it is clear that the respondent had made a decision to move to subcontract their crane work in the South-West and there is no reliable evidence that they did not continue to do so up to the time of hearing. I accept and so find that the company did make an economic decision to move to subcontract their crane work.
- 50 There is a dispute also in the evidence as to the role that safety issue played in the dismissal of Mr Dawson. I am not convinced that this evidence amounts to anything more than suspicion on the part of the applicant. I am confident that safety issues, or Mr Dawson's expressed concern about them, played no part in his termination. The evidence of Mr Murphy is that he attended site on the Silos project, there were safety problems in relation to some riggers who worked for a subcontractor and these problems were rectified. This was not an ongoing issue. He later contacted Mr Stott after Mr Dawson was dismissed and had a heated discussion with him about Mr Dawson's dismissal. It was then not an issue to do with safety. Whether or not these issues were raised with Mr Gordon does not in my mind change the situation. The safety concerns are unrelated, in my view, to the termination of Mr Dawson's contract.
- 51 The key issue is whether Mr Dawson or Mr Kohler should have got the Port Hedland job. The respondent had work for a crane driver in Port Hedland at the time of Mr Dawson's termination. The contract for that job had been signed on 16 December 2002. This was never discussed with Mr Dawson. The company did foreshadow that he would be made redundant but there was no discussion as to the possibilities for him past the payments that were due. The respondent variously says that Mr Dawson was not qualified for the job in terms of his certifications, that Mr Kohler was better qualified for the job in terms of his adaptability for the Port Hedland situation, or that Mr Dawson was unlikely to have wanted the Port Hedland work as it meant re-locating to Port Hedland. The respondent does not query the quality of Mr Dawson's work as a crane driver. They do maintain that Mr Kohler was more experienced on the 80 tonne crane.
- 52 Before assessing that key issue more fully I am concerned about the treatment of Mr Dawson prior to his dismissal. He was called into the office on 29 November 2002 and directed to go on annual leave due to the absence of work. Whilst on holidays he contacted the respondent several times and met with the managing director. All of this was in the hope of getting some indication of when he could return to work. He was given no clarity. It is the case that contractors were used for crane work whilst he was on holiday. He then returned from holiday on 13 January 2003, having exhausted all his leave. He worked one day before being called into the office on 14 January 2003 and told in a brief discussion that he was being made redundant effective immediately. He collected his pay which had already been made up and left. That was the end to 15 ½ years of work with the company.
- 53 Mr Jones on behalf of the respondent says that the requirements of the *MCE Act* are that once a decision has been made to make an employee's job redundant then they are advised as soon as reasonably practicable after the decision has been made. He submits that the decision was not made until 14 January 2003. I accept that the evidence leads to that conclusion. However, the evidence also is that contractors were engaged whilst Mr Dawson was on leave. The evidence is that the contract for Port Hedland was signed on 16 December 2002. Clearly there was considerable work undertaken to obtain that contract. The evidence is that Mr Dawson was not a contender for the Port Hedland job in the minds of the senior management team. I refer in particular to the evidence of Mr Gordon under cross-examination; a segment of which I have quoted. Indeed I doubt that much thought was given to Mr Dawson in relation to the Port Hedland job. It is then only a short step to conclude that management must have known that their decision making about these matters was likely to affect permanently Mr Dawson's employment at the time he was sent on leave. It surely would have been kinder to advise him of his potential redundancy at least prior to him taking leave so that he could have directed his energies to seeking out work and could have conserved his funds. This displays a disregard for Mr Dawson's interests; that disregard is present throughout this matter.
- 54 I turn then to the selection of Mr Kohler for the Port Hedland job. This is the work that the respondent had in prospect. The fact that the work had not commenced at the time of Mr Dawson's termination is not relevant as Mr Kohler was employed only 6 days later. It cannot be the case that the company could have known that Mr Dawson would not have gone to Port Hedland if the job had been offered to him. The issue was never put to Mr Dawson so he never had the opportunity to decide or express a view. Mr Dawson says convincingly in evidence that he would have gone to Port Hedland. Mr Jones for the respondent submits that Mr Dawson knew of the Port Hedland work but never raised it with the company and never asked about the prospects of that job in his discussion with Mr Stott on 14 January 2003. This is not to the point. The decision of the Industrial Appeal Court in *Garbett* makes it plain that the onus lies with the employer to comply with s.41(2) of the *MCE Act*; namely to discuss "measures that may be taken by the employee or the employer to avoid or minimize a significant effect" on the employee.
- 55 I would have no query with Mr Dawson's termination, save for the timing of it as expressed above and the amount of notice paid, if he had been asked if he wanted to go to Port Hedland and he had rejected the offer. This did not happen. The respondent accepts rightly that they should have paid Mr Dawson 5 weeks notice instead of one week of notice. It is an aspect of the unfairness of Mr Dawson's termination that he was not paid sufficient notice. However, the respondent simply decided that Mr Kohler, a previous employee, was the best man for the Port Hedland job. They decided that Mr Dawson was not competent to perform the job. This is most clearly apparent in the evidence of Mr Murphy, but is well supported by the evidence of Mr Stott and Mr Gordon. It is submitted on behalf of the respondent that the onus lies with the applicant to prove that he should have been selected for the job instead of Mr Kohler. Mr Jones refers to the decision in *Gromark Packaging* (op cit). Whilst the Commission would be reluctant to interfere in the selection decisions of an employer, this submission is not to the point. The distinction is that Mr Dawson at the relevant time was the only crane driver employed by the respondent. Mr

- Kohler had resigned from the company the previous year to pursue better money elsewhere. The evidence is that he was working on the Burrup at the time of Mr Dawson's dismissal. This is not a case where one employee was selected in preference to another. Mr Kohler was not an employee. I should add that Mr Dawson had been with the company continuously for over 15 years and obviously in that time had shifted between project sites, albeit all in the South-West region. It was not project by project employment.
- 56 The issue is whether Mr Dawson was competent to perform the Port Hedland work either immediately or within reasonable time. It cannot be the case that Mr Dawson could be said to not have been qualified as a crane driver. He had operated the 80 tonne crane on alternate days on the Silos project without fault or complaint. It is clear from Mr Stott's evidence that he did not know of the level of certification which Mr Dawson possessed at the time the decision was made. Mr Murphy gave cogent evidence as to Mr Dawson's capabilities to operate a crane to the desired standard. Indeed Mr Dawson now has his certification for a 100-tonne crane. It is also Mr Dawson's unchallenged evidence that he was competent to maintain cranes, disassemble, transport and assemble cranes and maintain light vehicles. He had experience with all these facets of work in the past.
- 57 The employer says that Mr Dawson did not have the certificates required for the job. The certificates required were first aid, forklift, bobcat, dogging and the capabilities to be a leading hand and to work in the North-West. It would be a wrong approach to prevent an employee from working in the North-West simply because they had not worked there before. The evidence is that Mr Dawson had not been required to supervise other employees whilst working for the respondent; he had been required to train others. There is no evidence that Mr Dawson was incapable of doing so, and his evidence is that he had supervised other employees in the past. As to the other competencies Mr Dawson says that he either has performed these skills previously or could be accredited quite simply through training. Mr Dawson had previously held a first aid certificate, it was simply not current. The evidence is that he would have taken a day or two to be re-accredited. Mr Dawson had driven a forklift and whilst it was disputed as to whether certification was required it was a straightforward task to be accredited. This is apparent from Mr Murphy's evidence. The same is true for accreditation for operating a bobcat or for dogging. It is challenged as to whether Mr Kohler would have to perform dogging as he could not operate a crane at the same time. I have sympathy for this argument but irrespective it is Mr Kenning's evidence that it takes about a week to obtain certification through a private provider.
- 58 In short form I find that it is probable that Mr Dawson was competent to perform the Port Hedland work albeit after some training to be certified in certain skills. The respondent did not look at the issue in this way. They in fact overlooked and disregarded Mr Dawson and chose to employ another worker, albeit one that had worked for them previously and who had operated the 80 tonne crane for longer. In all the circumstances which I have just described Mr Dawson was not given a fair go all round (*Undercliffe* (op cit)) and the respondent did not comply properly with s. 41 of the *MCE Act*. For these reasons and due to the lack of adequate notice I find that Mr Dawson's dismissal was harsh and unfair.
- 59 I find that re-instatement is not practicable. At the time of hearing Mr Dawson had been unemployed for approximately 10 months. That is a long delay but I doubt that an employment relationship of trust could be re-established in any event. During that time Mr Dawson had sought work and had earned a total of \$1,000. The question of mitigation was not challenged to any significant degree by the respondent. I find that Mr Dawson did seek to properly mitigate his loss. Mr Dawson says that he has had trouble getting a job due to his age. There is no suggestion that he was not physically capable of working.
- 60 Mr Dawson claims injury and says that he was distressed by his dismissal and had to obtain some medication from his doctor. I do not rate this evidence as more than the distress caused by many dismissals which are often very stressful for a variety of reasons. I apply the decision of the Full Bench in *Nicholas Richard Lynam -v- Lataga Pty Ltd* 81 WAIG 986 and I do not find that there is any reason which qualifies Mr Dawson for an award for injury. In summary, Mr Dawson's loss is the loss of income to the date of hearing of just over 10 months (in fact it is 44 weeks), less the amount he has earned of \$1,000 and minus the 9 weeks pay which he received on termination. If Mr Dawson has since been paid the additional four weeks pay by way of notice then that should also be deducted; but I do not know that. It matters not however because the loss incurred less the deduction, even if I were to account for a further four weeks, exceeds the statutory limit of six months and there is no separate claim for a denied contractual benefit. I would therefore award Mr Dawson the amount of six months in compensation. I should add that there is no evidence that the Port Hedland job would have been completed earlier.
- 61 Mr Randles submits that the figure to be used in calculating Mr Dawson's loss is the amount apparent for year to date earnings in [Exhibit A6]. This he says is a four month figure. He then adds a component for superannuation as part of the contract. I accept that method of calculation for Mr Dawson's total remuneration. I note however that [Exhibit A6] has a component for year to date superannuation also. Therefore I calculate loss as follows. I would add the figures in [Exhibit A6] of \$13,664.61 and \$1,146.22 to give a total of \$14,810.83. This is a four month figure which I would then multiply by 1.5 to give a six-month figure, the total loss then would be \$22,216.25. This is the amount I would award, less any taxation payable to the Commissioner of Taxation, to be paid within seven days of the date of the order.

2004 WAIRC 11064

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	PHILLIP DAWSON	<b>APPLICANT</b>
	-v-	
	DEVAUGH PTY LTD ABN 73 008 792 265	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S WOOD	
<b>DATE OF ORDER</b>	TUESDAY, 6 APRIL 2004	
<b>FILE NO</b>	APPLICATION 175 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11064	

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<b>Result</b>	Applicant dismissed harshly and unfairly; compensation awarded
<b>Representation</b>	
<b>Applicant</b>	Mr A Randles of Counsel
<b>Respondent</b>	Mr D Jones as agent

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*Order*

HAVING heard Mr A Randles of counsel on behalf of the applicant and Mr D Jones on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

- (1) DECLARES that the applicant, Phillip Dawson, was harshly and unfairly dismissed by the respondent on the 14th day of January 2003;
- (2) DECLARES that reinstatement is impracticable;
- (3) ORDERS that the said respondent do hereby pay within 7 days of this order, as and by way of compensation, the amount of \$22,216.25 to Phillip Dawson, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S WOOD,  
Commissioner.

[L.S.]

**2004 WAIRC 10980**

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<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	SHIRLEY FOREMAN	<b>APPLICANT</b>
	-v-	
	CRAIGIE SENIOR HIGH SCHOOL P&C ASSOCIATION	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE OF ORDER</b>	FRIDAY, 26 MARCH 2004	
<b>FILE NO</b>	APPLICATION 4 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 10980	

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**Catchwords** Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should be exercised – Acceptance referral out of time granted – Industrial Relations Act 1979 (WA) s 29(1)(b)(i),(2)&(3)

<b>Result</b>	Application to accept applicant's claim which was lodged out of time granted
<b>Representation</b>	
<b>Applicant</b>	Ms S Foreman
<b>Respondent</b>	No appearance

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*Reasons for Decision*

- 1 On 5 January 2004 Shirley Foreman ("the applicant") referred a claim to the Western Australian Industrial Relations Commission ("the Commission") pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively and unfairly dismissed on 19 November 2003 and was owed benefits under her contract of employment with Craigie Senior High School P and C Association ("the respondent").
- 2 Section 29(2) of the Act requires that applications pursuant to s29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 5 January 2004 it is 19 days out of the required timeframe for lodging a claim of this nature. The matter was listed for hearing to allow the parties to put submissions and to give evidence as to whether or not this application should be accepted under s29(3) of the Act. Section 29 (3) of the Act reads as follows:
  - "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."
- 3 Prior to the hearing commencing on 11 March 2004, the respondent's agent sent a facsimile that day to the Commission advising that the respondent did not oppose the applicant's claim to extend time to file this application, even though the respondent continued to deny the applicant's claim that she was unfairly terminated. The Commission was also advised that the respondent would not be attending the hearing scheduled for that day. In the circumstances and pursuant to the powers under s27(1)(d) of the Act the Commission formed the view that it was appropriate to proceed with the hearing in the absence of the respondent.
- 4 In reaching a decision in this matter I take into account whether there was an acceptable explanation for the delay in lodging the application, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that she was unhappy with her termination and that she would contest her termination and prejudice to the respondent. These guidelines were discussed as being relevant to a matter of this nature by Beech SC in *Anthony William Andrew v Metway Property Consultants & Auctioneers* (2002) 82 WAIG 3260. In applying these guidelines I am mindful that there is a 28 day time frame to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless there is good reason to do so.

**Findings and Conclusions**

- 5 The applicant and Doreen Alice Fay, a voluntary canteen worker and member of the respondent, gave evidence. The applicant commenced employment with the respondent in September 1987 as a Canteen Assistant and in 1988 she became the respondent's Canteen Organiser. The applicant worked 37 hours per week during school terms and she was entitled to four weeks' paid annual leave per year. The applicant was employed under a series of written contracts which were rolled over by agreement at the beginning of each year. In 2003 the applicant did not have a written contract of employment with the respondent as it was possible Craigie Senior High School ("the School") would close at the end of 2003. In the event the parties agreed at the beginning of 2003 that the applicant's existing terms and conditions would continue to apply to her employment.
- 6 An incident occurred on 25 August 2003 between the applicant and another canteen employee, Ms Boeyen, and as a result of this altercation the applicant took sick leave. The applicant subsequently submitted a medical certificate from her psychiatrist, Dr Claassen, stating that she was unfit for work from 25 August until 8 September 2003 and a further certificate from Dr Claassen was provided to the respondent for the period 25 August 2003 to 19 December 2003 the date on which the applicant says the respondent had committed to employing her given the intended closure of the School.
- 7 The respondent held a meeting on 2 September 2003 and the Minutes of this meeting confirm that the following motion was passed:
- "That wages and conditions will be maintained until such time as we receive notification from Shirley Hutton [the applicant] that she will be able to return to work."
- (Exhibit A7)
- 8 The respondent's Notice of Answer and Counter Proposal confirms that on or about 24 September 2003 the respondent received a further medical certificate for the applicant, issued by her General Practitioner, Dr Tan. The certificate stated that the applicant was on sick leave from 9 September 2003 until 27 October 2003. As the respondent was concerned that the end date on this certificate may have been altered by the applicant it made enquiries to the applicant and Dr Tan. Dr Tan respondent stating that he was unable to assist the respondent with its enquiries. The applicant responded and conceded that she had filled in the end date on the certificate because she understood that Dr Tan had left it blank for her to complete. The applicant also stated that when she added this end date she was not thinking clearly at the time because she was extremely unwell, depressed and suffering from anxiety attacks.
- 9 On 26 September 2003 the respondent's Executive held a further meeting. In its Notice of Answer and Counter Proposal the respondent maintains that the motion it passed on 2 September 2003 was rescinded and a new motion was passed. This new motion read:
- "That wages of 6.5 hours per day will be paid on a weekly basis to canteen employee, Shirley Hutton (the applicant) provided that a current medical certificate is produced on a weekly basis for the wages in question. If certificates are not produced, the time will be treated as leave without pay, unless Ms Hutton agrees to authorise payment by use of accrued leave entitlements. Payments will cease on the closure of the school on December 5, 2003."
- 10 The applicant was advised by the respondent that the respondent had resolved to make weekly payments to the applicant only if weekly medical certificates were provided by the applicant. The applicant gave evidence that she was unwell at the time and that she was hospitalised for seven days at the Armadale Mental Health Unit, and on two occasions had tried to commit suicide. Given the state of her health it was therefore difficult for her to obtain weekly medical certificates. Notwithstanding this she submitted certificates for all but 5 weeks during this period.
- 11 The applicant confirmed that on 3 November 2003 she was advised by the respondent that as the School was closing the canteen was to close on 5 December 2003 and that her services would no longer be required subsequent to that date.
- 12 By letter dated 4 November 2003 the respondent gave the applicant five days to show cause why she should not be instantly dismissed for altering Dr Tan's medical certificate. The applicant responded on 6 November 2003 stating again that she was unwell when she added the date to the medical certificate and she offered to resign if her entitlements were paid to her, including five weeks' pay for notice. The respondent wrote to the applicant on 17 November 2003 advising her that as she had filled out the end date of the medical certificate from Dr Tan, this justified the respondent instantly dismissing her. The respondent also advised the applicant that in recognition of her service to the respondent she would be given the opportunity to submit her resignation effective immediately and if the applicant chose this option she would be paid leave entitlements of approximately two weeks' pro rata annual leave and one week's pro rata long service leave (exhibit A4). The applicant was given until 2.00 pm of Wednesday, 19 November 2003 to respond. The applicant stated that she did not respond to this letter.
- 13 There was evidence that the applicant was unwell subsequent to 25 August 2003 and that she had a medical certificates from Dr Claassen covering the period 25 August 2003 to 19 December 2003. It is my view that the applicant's state of health should have been given a greater weight by the respondent when considering whether to terminate the applicant for filling in the end date of Dr Tan's medical certificate. The applicant gave evidence that no previous performance issues had been raised with her prior to 25 August 2003 and she was a long standing employee. Even though the applicant referred to some general issues being raised with her by the respondent after 25 August 2003 I accept the applicant's evidence that there was no substance to these complaints. I also note the positive reference dated 6 November 2003 which was given to the applicant by the School's Registrar (exhibit A8). I therefore find that there may well be some merit to the applicant's claim that she was unfairly terminated.
- 14 Even though this application was lodged after the required time frame for lodging an application of this nature I accept the applicant's evidence that she took steps to lodge this application within the required time frame. She obtained the application form and attempted to fill in the form soon after being terminated. I accept that the applicant's evidence that she became anxious each time she attempted to complete the application. The applicant's high level of anxiety during this period was corroborated by Ms Fay. I accept the applicant contacted lawyers to assist her with her claim and that financial difficulties prevented her from engaging one of the lawyers she approached. I find that as the applicant's health improved and her anxiety attacks lessened this enabled the applicant to fill out her form however, by this point the application was 19 days outside of the required time limit.
- 15 I accept the applicant's evidence that the respondent's President was aware that the applicant was unhappy about her termination and that the applicant had been receiving advice from the Department of Consumer and Employment Protection about her situation.
- 16 It is my view that the respondent will not be prejudiced anymore than the normal disadvantage associated with a claim for unfair termination if this application was allowed to proceed.

- 17 Taking into account the circumstances as a whole it is my view that the balance of convenience in relation to this matter lies with the applicant in that there was an acceptable reason for the delay, there is sufficient to establish an arguable case and the respondent was aware that the applicant was concerned about her termination. The delay in lodging the application was not insignificant however, I am satisfied with the applicant's explanation for the delay and given that there is no evidence of prejudice to the respondent in allowing this application, apart from the normal disadvantage associated with a claim for unfair termination, I have formed the view that it would be unfair not to extend time within which to file this application.
- 18 An Order will issue to that effect.

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**2004 WAIRC 10993**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SHIRLEY FOREMAN **APPLICANT**

-v-

CRAIGIE SENIOR HIGH SCHOOL P&C ASSOCIATION **RESPONDENT**

**CORAM** COMMISSIONER J L HARRISON

**DATE OF ORDER** TUESDAY, 30 MARCH 2004

**FILE NO/S** APPLICATION 4 OF 2004

**CITATION NO.** 2004 WAIRC 10993

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**Result** Application to accept applicant's claim which was lodged out of time granted.

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*Order*

HAVING heard Ms S Foreman on her own behalf and there being no appearance on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application to extend time in which to file this application be granted.

[L.S.]

(Sgd.) J L HARRISON,  
Commissioner.

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**2004 WAIRC 10965**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SHANE FORKNALL **APPLICANT**

-v-

STEVEN LENZ SUPA VALU **RESPONDENT**

**CORAM** COMMISSIONER P E SCOTT

**DATE** THURSDAY, 25 MARCH 2004

**FILE NO** APPLICATION 2 OF 2004

**CITATION NO.** 2004 WAIRC 10965

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**Catchwords** Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Acceptance of referral out of time granted – *Industrial Relations Act 1979 (WA) s 23A, s 29(1)(b)(i),(2)&(3)*

**Result** Application to receive application out of time granted

**Representation**

**Applicant**

**Respondent**

On his own behalf

Ms L Lenz and with her Mr S Lenz

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*Reasons for Decision*

*(Given extemporaneously and edited by the Commissioner)*

- 1 This is an application to have an application claiming unfair dismissal filed out of time. The application was lodged on 5 January 2004. The applicant claims that the dismissal took place on 4 December 2003, and the respondent agrees with that. The applicant says, though, that what he was told on 4 December 2003 was that there would be no further work for him, they were cutting down, he might be made casual, and hours would be made available to him. He says that he made inquiries over a period of time, and then when no further work was available to him about 3-4 weeks after 4 December 2003, he approached the respondent and was told that he had in fact been dismissed on 4 December 2003. No reasons were given at that time.
- 2 The applicant later received a letter from the respondent setting out a number of reasons for the decision to terminate.

- 3 He says that as soon as he found out that the termination had occurred, he contacted the Commission, was sent the forms, filled them out, and returned them as soon as possible.
- 4 The applicant denies the substance of the allegations which the respondent relies upon to justify the termination of employment. He says that he did not challenge the dismissal between the time his employment was terminated and the filing of the application and the service of that application. There is no Declaration of Service from the applicant to demonstrate what date he served the Notice of Application on the respondent, but according to what Ms Lenz has to say, it is likely that the application was served upon the respondent within a couple of days after it was filed on 5 January 2004.
- 5 The application would at the most be 4 days out of time. It is less than that taking account of Thursday, 25 December, and Friday, 26 December 2003 and Thursday, 1 January 2004 being public holidays, so it may in fact be only 1 day out of time.
- 6 The tests to be applied for receiving a claim of unfair dismissal outside the 28 day time limit set out in the Industrial Relations Act 1979, are those contained within the reasons for decision of Kenner C in the decision of the Full Bench in *Director General of the Department of Education and Prem Singh Malik* (83 WAIG 3056 at 3064) as follows.
- “(a) Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;
  - (b) An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;
  - (c) It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;
  - (d) Considerations relevant to whether it would be unfair to not extend time include -
    - (i) the length of any delay;
    - (ii) the explanation for the delay;
    - (iii) steps taken if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested;
    - (iv) the merits of the substantive application in the sense that there is a sufficiently arguable case; and
  - (e) Whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent, without more, is not a sufficient basis of itself, to grant an application for an extension of time.”
- 7 In this case I note that the length of the delay is at most 4 days. The explanation for the delay is, at least in part, that the applicant says that he was not aware that what occurred on 4 December 2003 was a termination of employment until at least 2 weeks later. Upon being advised of that, he undertook the necessary steps to have the forms to enable him to make his claim sent to him. He filed the Notice of Application and served it within a reasonable time. He did not evidence any non-acceptance of the termination of employment until he filed the Notice of Application, but, as I say, it was at maximum 4 days out of time.
- 8 The merits of the substantive application in the sense that there is a sufficiently arguable case are that the applicant says that the grounds for dismissal alleged by the employer are not justified. He denies that he was late for work such as to justify termination of employment. He says that in respect of any allegation of theft that he was not spoken to about those matters, and, further, he says that his manager, Sharon, gave him permission to eat the meal that he is said to have taken. He says that in respect of a deodorant that was in his locker that other people had access to that. He says the issue of theft was never raised with him before the termination of employment. The applicant says he was never spoken to about these issues, nor about being disruptive. So, in effect, the applicant challenges both the substance of the allegations and that he was told that they would lead to his dismissal.
- 9 The respondent denies that those things are so and maintains the allegations against the applicant. It is also of interest to note that the respondent says that it has what I take to be statements from members of staff as to those issues which would challenge the applicant's story on those matters.
- 10 In the circumstances, I find that the length of delay is minimal and the explanation for the delay is a reasonable one. The fact that the applicant did not demonstrate a non-acceptance of the termination of employment until he filed the application some 2-4 days late should not be an impediment to the applicant proceeding. I am satisfied that there is a sufficiently arguable case, and I will make the point to both sides that in finding that there is a sufficiently arguable case, all I am required to do is be satisfied that the applicant has a case that he can argue. It does not mean that he is correct on those matters. It is a matter which still needs to be determined.
- 11 In the circumstances, the respondent says in respect of any prejudice, and it is quite a legitimate argument, that any delay in obtaining accurate information from staff as to these matters can prejudice the proper pursuit of a defence against them. In this case, though, it seems the respondent has gathered that information and would have done so within a fairly short time of the process of filing the documents. In those circumstances I am not satisfied that there is any prejudice to the respondent in the application to extend time being granted.
- 12 As the purpose in granting an application is to do justice between the parties, it is my intention to grant the application to extend time and therefore to receive the application which would allow the matter to go to the next step. Accordingly, an order shall issue to grant the extension of time. The parties will be contacted for the purpose of conciliation to see if there is any prospect of agreement being reached between them.
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**2004 WAIRC 10966**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SHANE FORKNALL	<b>APPLICANT</b>
	-v- STEVEN LENZ SUPA VALU	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT	
<b>DATE OF ORDER</b>	THURSDAY, 25 MARCH 2004	
<b>FILE NO</b>	APPLICATION 2 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 10966	

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**Result** Application to receive application out of time granted

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*Order*

HAVING heard the applicant on his own behalf and Ms L Lenz and with her Mr S Lenz on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application to receive the application out of time be and is hereby granted.

[L.S.]

(Sgd.) P.E. SCOTT,  
Commissioner.

**2004 WAIRC 10916**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION NEVA HALVORSON	<b>APPLICANT</b>
	-v- KARMET PTY LTD AS TRUSTEE FOR THE CAZ UNIT TRUST TRADING AS CAZ SOFTWARE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 19 MARCH 2004	
<b>FILE NO/S</b>	APPLICATION 811 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10916	

**Catchwords** Industrial law - Termination of employment – Harsh, oppressive and unfair dismissal – Whether applicant an employee of the respondent – Intent of parties considered – Employment contract terminated by frustration – No dismissal at the initiative of the employer – Commission lacks jurisdiction – Application dismissed – *Industrial Relations Act 1979* (WA) s 23, s 23A & s 29(1)(b)(i); *Workplace Agreements Act 1993* (WA).

**Result** Application dismissed

**Representation**

**Applicant** Ms J Stevens of counsel

**Respondent** Mr D Barker of counsel

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*Reasons for Decision*

- 1 This matter contains some unusual features. The applicant claims that she was employed by her late husband Mr Zahra, the then principal of the respondent, in or about 1998 and was dismissed on 23 May 2003. The applicant brings this claim pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (“the Act”) alleging she was harshly, oppressively or unfairly dismissed, and seeks an order of reinstatement pursuant to s 23A of the Act.
- 2 The respondent denies that there was any employment relationship between the applicant and the respondent alternatively, if there was an employment relationship that relationship came to an end by the frustration of the contract, on the death of Mr Zahra in April 2003.

**Contentions of Parties**

- 3 Counsel for the applicant submitted that at all material times, the applicant was in the employment of the respondent, providing home duties and carer duties to the respondent’s principal, the late Mr Zahra, from about 1998 to when the applicant was purportedly dismissed on 21 May 2003. The applicant’s submission was that although the applicant and the late Mr Zahra were in the relationship of husband and wife that was no barrier to a finding of the existence of a contract of employment: *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8.
- 4 The applicant submitted that the contract of employment between the applicant and the respondent was evidenced by payment of wages, deduction of taxation, the payment of superannuation contributions and other indicia of an employment relationship. It was submitted that the termination of the applicant’s employment by the respondent, purportedly because of legal action commenced by her against directors and shareholders of the trustee company controlling the respondent, was unfair.

- 5 Furthermore, it was submitted that the Commission, if it found favour with the applicant's claim, could order the reinstatement of the applicant, without any obligation on the respondent to require the employee to perform work: *Ramsey Butchering Services Pty Ltd v Blackadder* [2003] FCA 20.
- 6 Counsel for the respondent submitted that the applicant was never an "employee" of the respondent, such that the present claim is not justiciable before this Commission. It was submitted that the relationship between the applicant as wife of the late Mr Zahra, and the performance by the applicant of duties which she herself described as "home duties and carer", was not one that viewed objectively, was intended to form the basis of legal relations: *South Australia v The Commonwealth* (1962) 108 CLR 130. Alternatively, if the Commission did conclude that there was an employment relationship on foot, then on the death of Mr Zahra, who it was submitted was the sole subject matter of the contract of employment if one existed, the contract was discharged through the operation of the doctrine of frustration. As the submission went, any steps taken by the respondent to "terminate" the employment were of no effect in law, as the contract of employment was already at an end.

#### **Factual Background**

- 7 The applicant testified that in about September 1998 she became an employee of her late husband Mr Zahra, as she described it, "on behalf of his company the respondent." The applicant said the arrangement was oral, and she was, as a part of her duties on her evidence, involved in providing general support both at home and in relation to the late Mr Zahra's work responsibilities. The applicant testified that her late husband often worked at home and she provided support such as answering telephones, taking messages, helping in marketing and entertaining, and travelling interstate on company business with him.
- 8 The applicant said in 1999, her arrangements were formalised and she was to be treated like any other employee of the respondent. The applicant testified that she received a salary, from which tax was deducted, had a fully maintained motor vehicle, other expenses were paid and she regularly received group certificates and PAYE and PAYG summaries in the period to 2003. Copies of these documents, including an employment declaration signed on 17 May 1999, were tendered as exhibit A 4.
- 9 Whilst the applicant was a little vague as to her status prior to this time, she still regarded herself as being paid for her services.
- 10 In 2002, the late Mr Zahra was diagnosed with terminal cancer and the applicant's evidence was that from this time on, she was solely dedicated to his care and attention. From about this point, it seems on the evidence, her late husband did not attend the office of the respondent, and any work done was done from their home. According to the applicant's testimony, she was at her late husband's "beck and call" 24 hours per day. This included providing at home nursing assistance, as the applicant was a registered nurse.
- 11 According to the applicant, her relationship with her late husband deteriorated during 2002 and early 2003, leading to her commencing proceedings in the Family Court in relation to a divorce and property settlement. Despite their difficulties, the applicant testified that she continued to provide the same level of home care and support to her late husband as she had done previously.
- 12 The late Mr Zahra passed away on 21 April 2003. Following this, by letter dated 21 May 2003 from Mr Noble, the general manager of the respondent, the applicant was notified that as a result of legal action commenced between her and Karmet Pty Ltd, the trustee company of the respondent, the respondent's board resolved to bring an end to any employment arrangement that existed between the applicant and her late husband. The applicant contested the allegation that she had commenced proceedings as described, and testified that she was entitled to pursue her rights in the Family Court, in relation to property settlement and divorce, following the breakdown of her marriage. The applicant described her dismissal as being unfair, and said she was seeking reinstatement without loss of remuneration.
- 13 The respondent called evidence from the late Mr Zahra's brother, Mr Gabriel Zahra. He did not become a director of the respondent until 2002, at which time he learnt that the applicant was recorded on the company records as an employee. Mr Zahra testified that he discussed this matter with the respondent's accountant who was not aware that this arrangement existed and Mr Zahra had concerns with it. In general terms, Mr Zahra took issue with the applicant's assertions, that she was actively involved in aspects of the respondent's business, with her late husband. In short, Mr Zahra testified that from his own direct knowledge, the applicant's involvement was as her late husband's wife, and it was no more than that. He testified that it was not the respondent's policy to pay spouses of employees for home duties and care. In any event, Mr Zahra said that as far as he was concerned, the applicant's arrangements were only with his late brother, and on his death, those arrangements came to an end.
- 14 Mr Noble is the respondent's general manager and he assumed that position in about April 2002, when the applicant's late husband became ill. Mr Noble testified that when he became aware of the arrangement with the applicant, he had some concerns and raised this with the respondent's business advisers. He thought it may have been some form of income splitting arrangement with the applicant's late husband, the respondent's previous owner. It was Mr Noble's evidence, that he was never aware of the applicant actually working in the business of the respondent and nor did he regard her to be an employee of the respondent. She was not on the respondent's organisational chart in terms of staffing.
- 15 It was also Mr Noble's evidence that because of the illness of the late Mr Zahra, and the applicant was his wife, the situation was delicate. Because of the family nature of the business, sensitivity was required in dealing with the issue. He testified that the arrangement was continued on but the board of the respondent had concerns regarding taxation liability and the like, and decided to bring the arrangement to an end in May 2003.

#### **Consideration**

- 16 In this matter there are two threshold questions, as jurisdictional facts, that the applicant must establish to ground her claim. The first jurisdictional fact to be established is that she was at all material times, including as at the date of the purported dismissal, an employee of the respondent. If this is established, the applicant then needs to establish as a jurisdictional fact, that she was "dismissed" to attract the jurisdiction of the Commission: *Gallotti v Argyle Diamond Mines Pty Ltd* (2002) 82 WAIG 3011; *Byrne v Twaddle trading as Mount Hospital Pharmacy* (2003) 83 WAIG 5.

#### **Employment**

- 17 Turning to the first issue, counsel for the respondent submitted that the relationship between the applicant and the respondent, through her late husband, would not, objectively viewed, lead to the conclusion that there was an intention that such an arrangement could be adjudicated upon by a court or tribunal: *South Australia v The Commonwealth* (1962) 108 CLR 130. The respondent's submission was that in this case, the contracting parties were husband and wife and the topic with which the agreement dealt, was home duties and carer. It was also submitted that on the evidence, the applicant was somewhat uncertain

as to her status. Furthermore, it was submitted that the arrangement in essence, was for the purposes of income splitting and taxation reduction, and nothing more. For all of these reasons, there was no contract entered into, as the submission went.

- 18 Counsel for the applicant made a number of submissions in relation to this issue. First it was submitted that it was only pursuant to the *Workplace Agreements Act 1993* (WA) that any employment arrangements were to be “private”, and not amenable to the jurisdiction of this Commission. Further, the submission was that the applicant, as wife of her late husband, had capacity to contract with the respondent and all of the indications were that the contract was one that was justiciable and enforceable. Furthermore, it was submitted that the traditional test of “control”, is now less relevant in determining contracts of employment, in the contemporary Australia context: *Ermogenous* at par 80 - 84.
- 19 I do not understand the relevance of the submission concerning the *Workplace Agreements Act 1993* (WA). The question simply is in this matter, whether there was a contract of employment entered into between the applicant and the respondent, which was subsequently terminated by the respondent in circumstances to constitute a “dismissal” for the purposes of the Act. *Ermogenous* was a case concerning the issue of whether a Minister of religion was an employee. In the joint judgment of Gaudron, McHugh, Hayne and Callinan JJ in relation to the issue of intention to create contractual relations, it was said at pars 24 - 26:
24. *"It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty." [46] To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet "[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts" [47].*
25. *Because the inquiry about this last aspect may take account of the subject-matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances [48], not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties [49] (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened [50]. It is not a search for the uncommunicated subjective motives or intentions of the parties.*
26. *In this context of intention to create legal relations there is frequent reference to "presumptions". It is said that it may be presumed that there are some "family arrangements" which are not intended to give rise to legal obligations and it was said in this case that it should not be presumed that there was an intention to create legal relations because it was a matter concerning the engagement of a minister of religion. For our part, we doubt the utility of using the language of presumptions in this context. At best, the use of that language does no more than invite attention to identifying the party who bears the onus of proof. In this case, where issue was joined about the existence of a legally binding contract between the parties, there could be no doubt that it was for the appellant to demonstrate that there was such a contract. Reference to presumptions may serve only to distract attention from that more basic and important proposition."*
- 20 Those principles are applicable in the present context. The difficulty facing the Commission in this matter is that there is only evidence from the applicant as to the terms of her arrangement with the respondent, given that her husband is now deceased. However, there is other independent evidence before the Commission, by way of exhibit A4, which refers to various indicia, usually evidencing an employment relationship. This includes employment declarations, the issuance of group certificates and deduction of taxation, and the like. Additionally, is the statement of Ms Dyson, admitted by consent, to the effect that as the person responsible for finance and administration at the respondent, she prepared all relevant payroll documents and processed payments for the applicant, as for all other employees of the respondent, from about November 1999.
- 21 Whilst not without some oscillation, given the applicant's evidence as to her duties, on balance, at least from 1999, I am satisfied that there was a relationship of employer and employee. In particular the Commission is influenced by the existence of the documents contained at exhibit A4 which evidence the respondent entering into an employment arrangement with the applicant. This is not, of course, to say that documents executed by parties must be conclusive if in other respects the arrangements between them are a “sham”, as that concept is known to the law. “A sham is a pretence. It is something which is in reality other than what it purports to be. Lockhart J said on this matter in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449; 82 ALR 530:
- A “sham” is ... for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true but something made in imitation of something else or made to appear to be something it is not. It is something which is false or deceptive.” (See Laws of Australia Vol 17 Ch 5 Part C Div 2).*
- 22 I am not able to conclude on the evidence before the Commission in this case, that the arrangement between the applicant and the respondent fell into this category. Nor am I able to conclude on the evidence, that there was no intention by the parties that their relationship be of any legal effect and be justiciable in a court or tribunal. I find accordingly.

#### Dismissal

- 23 Given the existence of an employment relationship from 1999, the issue then becomes the significance of the events in May 2003, when the respondent purported to terminate the applicant's employment.
- 24 On all of the evidence, I am satisfied and I find, that the applicant's sole obligation, in relation to the arrangement entered into with her late husband, was for his care and maintenance both at home, and perhaps incidentally, in relation to some tasks associated with the respondent's business. I have no doubt on the evidence however, and as the applicant herself testified she was at her late husband's “beck and call”, that the object of the contract of employment which came about at least from 1999, was the applicant's late husband. There was no evidence before the Commission that the applicant ever undertook, or was required to undertake, any other duties or responsibilities for the respondent more generally. I so find. There was no suggestion on the evidence, that after her late husband's death, the applicant did or was required to perform any further duties by the respondent.

- 25 I am therefore satisfied and I find on all of the evidence, that the subject matter of the applicant's contract of employment with the respondent, at all material times was the sole care and support for her late husband Mr Zahra.
- 26 In this case, the contractual relationship between the parties was entirely personal in character. In my view, on the passing of her late husband, on 21 April 2003, in essence, the subject matter of the contract no longer existed. It is well settled law, that where through no fault of either party, a contract is no longer able to be performed or its operation has been radically changed, the contract comes to an end by operation of the doctrine of frustration: *Davis Contractors Ltd v Fareham Theorem UDC* [1956] AC 696 at 729; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.
- 27 In my opinion in the present case, the effect of the passing of the applicant's late husband, was to terminate the contract by frustration, with the result that the parties to the contract were discharged from performance of the contract, on and from the frustrating event: *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] AC 497 at 509; *Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 203. In the case of the discharge of a contract for a frustrating event, an election of either party to the contract is not a requirement: *Bank Line Ltd v Arthur Capel and Co* [1919] AC 435 at 459. Furthermore, on and upon the frustrating event, the parties' obligations are discharged *in futuro*, and the contract is not rescinded *ab initio*: *Hirsch v The Zinc Corporation Ltd* (1917) 24 CLR 34 at 64.
- 28 The present circumstance is also analogous to that of the death or permanent incapacity of one party to a contract for personal services: *Taylor v Caldwell* (1863) 122 ER 309 at 313; *Simmonds Ltd v Hay* (1964) 81 WN (Pt 1) (NSW) 358.

### Conclusion

- 29 In my opinion therefore, whilst the respondent by its letter of 21 May 2003, purported to terminate the applicant's employment with the respondent, in fact and in law, there was no such employment on foot at that time, capable of termination by the respondent employer.
- 30 As a consequence of this conclusion, in my view, the contract of employment between the applicant and the respondent came to an end independent of the acts of either party, on its frustration. Therefore, there was no "dismissal" to attract the Commission's jurisdiction for the purposes of the applicant's unfair dismissal claim.
- 31 Accordingly, for all of the foregoing reasons, the application is dismissed.

2003 WAIRC 09065

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	NEVA HALVORSON	<b>APPLICANT</b>
	-v-	
	KARMET PTY LTD T/A CAZ SOFTWARE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	MONDAY, 11 AUGUST 2003	
<b>FILE NO</b>	APPLICATION 811 OF 2003	
<b>CITATION NO.</b>	2003 WAIRC 09065	

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Ms J Stevens of counsel
<b>Respondent</b>	Mr D Barker of counsel

### Direction

HAVING heard Ms J Stevens of counsel on behalf of the applicant and Mr D Barker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT discovery is to be given by the respondent on affidavit of the following documents or classes of documents:
  - (i) The applicant's group certificates;
  - (ii) The applicant's pay records indicating taxation deducted;
  - (iii) Details pertaining to the applicant's workers' compensation coverage;
  - (iv) Details pertaining to the applicant's superannuation payments;
  - (v) Financial records of the respondent for the financial years 2001/2002 and 2002/2003; and
  - (vi) Australian Taxation Office declarations signed by the parties.
2. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
3. THAT the applicant file and serve upon the respondent any signed witness statements upon which she intends to rely no later than 21 days prior to the date of hearing.
4. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 14 days prior to the date of hearing.
5. THAT the parties file upon one another any signed witness statements I reply upon which they intend to rely no later than seven days prior to the date of hearing.
6. THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

2003 WAIRC 09659

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
NEVA HALVORSON **APPLICANT**

**-v-**  
CAZ UNIT TRUST T/A CAZ SOFTWARE **RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** MONDAY, 13 OCTOBER 2003  
**FILE NO/S** APPLICATION 811 OF 2003  
**CITATION NO.** 2003 WAIRC 09659

**Result** Amended direction issued  
**Representation**  
**Applicant** Ms J Stevens of counsel  
**Respondent** Mr D Barker of counsel

*Amended Direction*

HAVING heard Ms J Stevens of counsel on behalf of the applicant and Mr D Barker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the discovery referred to in paragraph 1 of the Commission's direction issued 11 August 2003 is to be given by the respondent by no later than 21 October 2003.
2. THAT the word "P" in paragraph 5 of the Commission's direction issued 11 August 2003 is deleted and replaced with the word "in".

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2004 WAIRC 10912

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
NEVA HALVORSON **APPLICANT**

**-v-**  
KARMET PTY LTD AS TRUSTEE FOR THE CAZ UNIT TRUST TRADING AS CAZ  
SOFTWARE **RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** FRIDAY, 19 MARCH 2004  
**FILE NO/S** APPLICATION 811 OF 2003  
**CITATION NO.** 2004 WAIRC 10912

**Result** Application dismissed  
**Representation**  
**Applicant** Ms J Stevens of counsel  
**Respondent** Mr D Barker of counsel

*Order*

HAVING heard Ms J Stevens of counsel on behalf of the applicant and Mr D Barker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2004 WAIRC 11124

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GEOFFREY WILLIAM HARRIS	<b>APPLICANT</b>
	-v- BGC RESIDENTIAL PTY LTD TRADING AS GO HOMES	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT	
<b>DATE OF ORDER</b>	TUESDAY, 13 APRIL 2004	
<b>FILE NO</b>	APPLICATION 261 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11124	

<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Acceptance of referral out of time granted – <i>Industrial Relations Act 1979</i> (WA) s 23A, s 29(1)(b)(i), (2)&(3)
<b>Result</b>	Application accepted out of time
<b>Representation</b>	
<b>Applicant</b>	Mr G Harris
<b>Respondent</b>	No appearance

*Reasons for Decision*  
(Given extemporaneously and edited by the Commissioner)

- 1 This is an application to extend time in which to receive an application in which the applicant claims that he has been harshly, oppressively or unfairly dismissed from his employment with the respondent. He also, in the same application, claims denied contractual benefits. The aspect of denied contractual benefits of the claim does not require an extension of time to be received, only the claim of unfair dismissal requires that extension of time.
- 2 I have heard the evidence of the applicant and I note his affidavit and the medical certificate provided by Dr Craig Turner of the 5th of April 2004. Termination of employment occurred on the 18th of December 2003. The application was filed on the 2nd of March 2004. Therefore the application is around 47 days out of time.
- 3 The evidence of the applicant is uncontested. There is no submission on the part of the respondent, either agreeing to or opposing the application for an extension. The applicant's evidence demonstrates that for the period from late December 2003, which is in the early part of the period of the time allowed for the filing of the notice of application in such a matter, the applicant suffered ill health for at least a couple of months. His doctor's advice includes that during January and February 2004, he suffered from physical ill health and was bedridden for much of this time. In the doctor's view, he would not have been fit to deal with matters of a legal nature such as bringing proceedings for the loss of his employment.
- 4 I am satisfied from the evidence that the applicant has brought that there has been good reason for, and an explanation for, the delay. In the circumstances, the length of delay is not an inordinate delay, albeit in the context of claims of unfair dismissal being referred to the Commission within 28 days of dismissal it is not a short period either, but the explanation for the delay covers that circumstance in any event.
- 5 There is no evidence before me that the applicant has taken any steps to evidence non-acceptance of the termination of employment during that time but perhaps that might also be explained by the applicant's circumstances which constitute the explanation for the delay.
- 6 In accordance with the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General Department of Education, Western Australia*, Pullin and Heenan JJ in particular make the point that it is not that the merits of an application are required to be dealt with as to whether or not there is a basis for the claim, or whether there is a prospect of success. However, if a respondent should challenge that then of course the issues certainly would arise.
- 7 Further, Heenan J notes that:
- 8 "For a late claim to be accepted it seems to me that it will in most cases, if not in every case, require some demonstration, whether by acknowledgment, tacit or express, or by the production of evidence that there is merit in the claim in the sense that it enjoys some prospects of success in the sense already described."
- 9 In these circumstances, the applicant in his affidavit and in the Notice of Application has referred to circumstances which certainly raise some question as to the justification for the termination of his employment and, to that extent, I am satisfied that the necessary test has been met.
- 10 It is clear that the intention of the legislation was to ensure that an application filed late can be dealt with where it is fair to do so and that it would be appropriate to extend time where it would be unfair not to do so.
- 11 In these circumstances I am satisfied that Mr Harris's case meets the necessary test and an order shall issue for the acceptance of the application out of time.

## 2004 WAIRC 11125

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	GEOFFREY WILLIAM HARRIS	<b>APPLICANT</b>
	-v-	
	BGC RESIDENTIAL PTY LTD TRADING AS GO HOMES	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT	
<b>DATE OF ORDER</b>	TUESDAY, 13 APRIL 2004	
<b>FILE NO</b>	APPLICATION 261 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11125	

**Result** Application accepted out of time

*Order*

HAVING heard the applicant on his own behalf and there being no appearance for or on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application to receive the application out of time be and is hereby granted.

[L.S.]

(Sgd.) P.E. SCOTT,  
Commissioner.

## 2004 WAIRC 10881

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	MURRAY ROSS HIGGINS	<b>APPLICANT</b>
	-v-	
	PAUL ANDREW BENNETT AND CRAIG BRADLEY DIX TRADING AS FINESSE PAINTING & PROPERTY MAINTENANCE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J F GREGOR	
<b>DATE</b>	MONDAY, 15 MARCH 2004	
<b>FILE NO</b>	APPLICATION 1251 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10881	

**Catchwords** Termination of employment – Harsh, oppressive and unfair dismissal – Whether applicant an employee or independent contractor – Principles applied – Summary dismissal – Lack of procedural fairness – Applicant harshly, oppressively and unfairly dismissed – Application upheld – Compensation ordered – *Industrial Relations Act 1979 (WA) s.7, s.26(1)(a), s.26(1)(c) and s.29(i)(b)(i)*

**Result** Unfairly dismissed. Compensation awarded

**Representation****Applicant**

Mr A. Randles of Counsel appeared on behalf of the Applicant

**Respondent**

Mr G. McCorry appeared on behalf of the Respondent

*Reasons for Decision*

- 1 On 15<sup>th</sup> August 2003 Murray Ross Higgins (the Applicant) applied to the Commission for an order pursuant to s.23A of the *Industrial Relations Act, 1979* (the Act) on the grounds that he had been unfairly dismissed from employment with Paul Andrew Bennett and Craig Bradley Dix t/a Finesse Painting and Property Maintenance (the Respondent) in a harsh, oppressive and unfair manner. The Applicant stated that the relationship was characterised by mistrust and in those circumstances, having lost faith in the Respondent, asserts reinstatement would be unavailing. He therefore seeks orders that he be paid compensation.
- 2 The Applicant contends that he was employed on 3<sup>rd</sup> July 2003 as a fulltime painter. Two weeks after his employment commenced with the Respondent he was offered and accepted a position with the Respondent as Painter Supervisor. There was an agreement that he would be paid \$26.00 per hour plus a fuel allowance. Later the Respondent told the Applicant it would no longer pay the fuel allowance. There were also arguments about superannuation which resulted in the Applicant's pay being adjusted to \$20.20 per hour plus \$4.00 travel allowance.
- 3 The Applicant claims that at all times he was employed under a contract of service as a painter on various jobs run by the Respondent. On the last day of his employment he recalls a conversation with an Organiser from The Construction, Forrest, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch (the Union) about an unrelated matter to his current employment. It was more than a coincidence therefore when one of the Respondent's principals approached him soon after and told him his employment was terminated. From this he drew the conclusion that his conversation with the Union Organiser was at least partially to blame for his dismissal although he was given other reasons at the time. Those other reasons were that the job was running over budget and that the only way the Respondent could bring the

- finance back under control was to end the Applicant's employment service. He does not seek reinstatement because not only has mutual trust been lost, but he secured alternative employment. He seeks compensation for the income lost as a result of the unfair dismissal.
- 4 The Respondent's case mounts a vigorous opposition to the claim through its advocate, Mr McCorry, on the basis that the Applicant contracted to the Respondent under a contract for services and represented to it that he was a painting contractor registered with the Painters Registration Board and carrying on business as a contractor. This representation first came about when the Applicant saw one of the Principals of the Respondent at work on a site and approached him for work as a contractor. He left a business card which described him as a painting subcontractor (Exhibit M1).
  - 5 It is asserted by the Respondent that the Applicant agreed to perform work on a subcontract basis and did so in the year 2002. When he performed that work he provided a tax invoice and charged goods and services tax on the invoiced amount. There was also work performed later in 2002 again on the same basis (Exhibit M2, M3).
  - 6 In May 2003 the Applicant approached the Respondent and again offered his services as a subcontractor and as a result performed work in that capacity.
  - 7 It is asserted that in June 2003 the Applicant said that he would no longer perform work at the agreed rate, he wanted a higher rate. The Respondent says it was forced to accept his demand.
  - 8 As a result of the higher rates the Respondent decided it could not keep the Applicant at work as a subcontractor beyond the completion of work on that project. The Applicant made various representations to the Respondent that he could get better money from other contractors but he retained his position working on the Respondent's jobs. This ended in July 2003 when the Respondent told the Applicant it could no longer afford the rates he was charging and no further work was offered.
  - 9 It is asserted that the Applicant was not an employee and the Commission lacks jurisdiction. In the alternative it is pleaded that if he was an employee he engaged in misleading, deceptive and fraudulent conduct in representing that he was a painting contractor by submitting tax invoices which were paid in good faith accepting his contention that he was a subcontractor. It is further submitted if the Applicant was in fact an employee he has suffered no loss in that the Respondent offered to engage him immediately the Applicant indicated of his intention to commence legal proceedings. The Applicant also failed to mitigate his loss by pursuing available alternative employment after ceasing work.
  - 10 Clearly the contentions of the Respondent raise the issue of whether the Applicant was in fact an employee.
  - 11 It is trite to say that whether he was or not depends on two things. First, whether the general law says he was an employee and second, whether a particular piece of legislation says for a particular purpose for instance, workers compensation or occupational, health and safety that he should be treated as an employee, what ever the common law says. The issues are well set out in the law for example in such authorities as *Stevens v Brodribb Sawmilling Company Proprietary Limited (1986)* 160 CLR 16; *Barry John Hollis v Vabu t/a Crisis Courier (2001)* HCA 44; *Franchita v Wave Master International Pty Ltd (1999)* 79 WAIG 1886.
  - 12 The common thread of these cases is that the common law does not have a clear and unequivocal definition of an employee, instead the courts look at the whole of the relationship. The main distinction is whether the Applicant in this case serves the Respondent in its business, in which case he would be an employee, or whether he carries on business on his own, in which case he would be an independent contractor.
  - 13 In the authorities I have cited the courts have established a series of *indicia* the weighing of which allows final judgement to be made about whether the overall relationship is one of employer/employee. I will deal with a number of *indicia* hereunder by applying the facts of the case as they have been disclosed by the evidence. The order in which I deal with them does not indicate a particular emphasis on the weighing process, although it is relevant to note that the question of control has been regarded in some authorities as a particularly important matter to consider. Also it is clear that the application relates to that relationship which commenced on 3<sup>rd</sup> June 2003. On the face of it some of the relationships in 2002 could be capable of producing a different conclusion as to the status and the form of the relationship to that which has occurred on the facts of 3<sup>rd</sup> June 2003 engagement.
  - 14 I will deal more with this issue later. I now consider the *indicia*.
    - *What degree of control did the Applicant have over the work. If the Respondent could direct him about specific aspects of how he went about the work this might support the contention that he was an employee.*  
The evidence before the Commission is that Mr Dix for the Respondent would visit the Applicant on site most days. The Applicant was expected to go about doing the work of a painter but the work was delineated. He knew exactly what he had to do and he was controlled to the extent of the allocation of work but he was expected to exercise his skills as a painter without minute by minute instruction. This in my view does not create control in the sense that is discussed in the cases that specify the *indicia* to be applied.
    - *The degree to which the putative contractor is integrated into or treated as part of the Respondent's enterprise for example whether he wears a uniform and represents the enterprise to the public.*  
There is no evidence that the Applicant wore a uniform. Nor is there any evidence that he represented the Respondent to the public. There is no evidence that he was required to wear any apparel that would identify him as being employed by the Respondent.
    - *Whether the putative contractor made a significant capital contribution to the enterprise for instance the provision of capital equipment. If a putative contractor brings his ordinary tools of trade it is not likely to be a significant factor.*  
In the work done after 23<sup>rd</sup> June 2003 the Applicant did not supply any equipment over than drop sheets. It could be said that a drop sheet for a painter is part of the normal accoutrements of his trade. In some of the work prior to the June 2003 engagement the evidence indicates that he may have supplied scaffolding that is why I indicated earlier that there might be a reason to reach a different conclusion or at least that there was a different set of facts in the engagements prior to the 3<sup>rd</sup> June 2003. There is no evidence that the Applicant supplied anything other than his normal tools neither did he supply any building materials or apparatus to assist in the building process.
    - *How the Respondent paid the putative contractor, for example by results or on an hourly basis. If he was paid by results this might support the contention that he was an independent contractor. The clear evidence is that the Applicant supplied invoices to the Respondent and every payment made to him was made on the basis of an invoice from which GST was deducted.*

There is some dispute between the parties about who required this form of payment. It is the Applicant's contention that payment on invoice is the custom in the industry and he would not have been able to create a relationship with the Respondent as a subcontractor unless he acquiesced to that type of payment.

But the Applicant says that he supplied invoices each week should not indicate that he was not an employee because that was the way the Respondent demanded that the payments be made.

It is clear that the Applicant was paid first \$26.00 per hour plus \$50.00 a week fuel allowance. After some conversations between the parties two weeks later the Respondent unilaterally withdrew the fuel allowance. There was then further discussions during which the Applicant advised the Respondent he would have to pay superannuation. Following this there was a further adjustment in the hourly rate to \$20.40 per hour with a \$4.00 per hour travel allowance. The Applicant was then told the \$4.00 allowance paid on one site and \$3.00 applied to other sites.

This method of payment is far away from the type of payments usually contemplated in a bona fide subcontract arrangement where the subcontractor nominates a lump sum, a lump sum is agreed and the parties work on the basis of that agreement. This is a situation where the parties were arguing about payment which has the nature and character of the payment of wages.

- *Whether the putative contractor has an obligation to work. If the Respondent has a right to dictate hours of work and the putative contractor cannot refuse a task this supports the relationship being employer/employee.*

There was some obfuscation on the Respondent's behalf about the obligation of the Applicant to work fixed hours. What it boiled down to on the evidence, and I so find, is that the Applicant was obliged to work 38 hours per week. The Respondent said he could work the 38 hours whenever he liked over the week but ultimately that total amount of hours could not be exceeded. If there was freedom for the Applicant to nominate when he wanted to work it was only to the extent that he could start earlier on a day if he wanted to finish early. However the Applicant's evidence seems to indicate that he was bound to work the hours which were generally worked on the site on which he was engaged. It is clear that the Applicant had limited, if any, ability to tell the Respondent that he was not going to work on the site for a day or longer. He was expected to do the work against the general amount of hours which was specified for a week.

- *Provision of leave, superannuation and other entitlements. These entitlements usually apply to an employee and not an independent contractor.*

There appeared to be no arrangement for leave entitlements, however the parties argued about the obligation of the Respondent to pay superannuation and it was eventually paid. There were entitlements to payment for travelling which are more akin to entitlements that an employee would receive than a contractor. The payment of the travel allowance is case in point.

- *Place of work that the putative contractor would work at his own premises might support him as being classified as an independent contractor.*

The arrangement in this case was that the Applicant was required to work on site, there was no off site work, there was no ability for him to work from his own premises at all.

- *Whether there is a right of delegation to work to others.*

From the evidence before the Commission it appears that there was no ability here for the Applicant to sublet the work to anyone else or to have it done. In fact he was called a supervisor at one stage. There is no indication that he had the right to delegate or sublet.

- *Whether income tax was deducted.*

Mr McCorry made much of the fact that the Applicant submitted business activity statements. Mr McCorry closely examined the Applicant about invoices and drew attention to various non-capital purchases reflected in the business activity statements. There was detailed examination of these documents to the end that Mr McCorry's clear assertion was that the Applicant carried on a business and represented himself to the Taxation Department not once but repeatedly as carrying on a business. The income that he received was from that business, he declared it as business income and that was substantially the income that he received from the Respondent. In this context Mr McCorry suggested that the parties represented themselves as being in a relationship of subcontractor and he relied on authorities to establish that contention. I will deal with that later in these Reasons (Exhibit M6 – M11).

- *Whether the putative contractor provides a similar service to the general public for instance does he advertise or put in public tenders.*

There is no evidence that the Applicant performed work for any other person by way of tender offering services during the period under review. He may well have done so prior to or after it. There was no evidence though that during the period he was employed by the Respondent he represented himself as providing services to the general public.

- *Whether the Applicant was supplying skilled labour or labour that required a special qualification.*

It is clear that the Applicant did provide skilled labour for which he had formal qualifications. The provision of his skills may weakly support the contention that he was an independent contractor.

- *Whether there was scope for the Applicant to bargain for remuneration. If there is no scope that supports the contention that he was an employee.*

I have related previously events relating to changes in payment. Those facts do not indicate there was very much bargaining power at all for the Applicant. He basically accepted what he was given on an hourly rate to which there were unilateral changes made by the Respondent.

- 15 The Commission is required to weigh the relevant factors and make a judgement about the overall relationship. That is whether it was one of employer/employee or one of independent contract that is a contract for services.
- 16 As I mentioned early Mr McCorry suggested to the Commission that this was a case where the parties represented to each other that there were in a bona fide contract. These were issues which had been addressed by the Industrial Appeal Court in *United Construction Pty Ltd v Birighitti J (1993)* 83 WAIG 434 where it was suggested that if there was an express arrangement between the parties and the appellant in that case performed the work in the period in question on a subcontract basis that this was conclusive of a subcontract relationship between the parties unless the subcontract relationship was a sham, which it was not.

- 17 Mr McCorry went on to closely develop this contention by reference to other periods of relationship between the parties concluding that the situation was at the least ambiguous. He argues that where the parties over the entire period have represented to each other that a particular relationship exists and in the absence of any evidence that it is a sham or the primary facts of the totality of the relationship contradicted, then the Commission should accept that what the parties say was the basis of the relationship was in fact the relationship.
- 18 Mr McCorry has properly recited the law to be applied but in my respectful view the facts do not lead to the conclusion he urges upon the Commission. Clearly as a question of balance on the evidence before the Commission and the weight of that evidence in each of the *indicia* the overwhelming conclusion is that the Applicant was not in a relationship of contract for services, on the contrary, he was truly an employee. If the parties did hold themselves out to be in a relationship other than a relationship of contract for services then that contention was a sham. The facts do not support that there was a subcontract relationship between the parties at all. I mention again that this is not to say that in their dealings over 2002-2003 that may not have been the case previously, but it is not the case in the contract under review which commenced on 3<sup>rd</sup> June 2003. I therefore conclude that the Applicant was an employee; the jurisdiction vested in the Commission by s.291(b)(i) of the Act is available for use by the Applicant in that he was an employee and that he was in an employment relationship with the Respondent.
- 19 I now turn to the dismissal itself. Clearly on the established criteria the Applicant did not receive a fair go in his dismissal. He was merely told that he should go because the Respondent had re-costed the job. He was given no options, no ability to change the way he was working, the dismissal cannot be anything other than unfair and I so find that there was no fair go all round. The question remains as to compensation to be awarded (*Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985) 65 WAIG 385*).
- 20 The rules to be applied in assessing compensation set out in *Boganovich v Bayside Western Australia Pty Ltd (1999) (79 WAIG 8)*. I apply those here.
- 21 The Applicant claims he suffered \$4,000.00 loss he says he looked for work for a couple of weeks, had a few days work for which he was paid \$800.00. Then he had another week off he did some work for another five days for which he received \$1,000.00, then he says he was terminated from that job. He invites the Commission to make an inference that he was dismissed because he brought the Union in on another job. Mr McCorry rightly observes there is no evidence of that. He also concedes the Applicant was out of work for another week and then received a job at Pearson Painting. In my view the rules in *Boganovich* correctly applied mean that a proper assessment of the loss is for a period of two weeks between finishing with the Respondent and commencing with Project Homes. There is no reason why the Applicant did not continue to work after that time.
- 22 Mr McCorry also submits that *Boganovich* correctly applied means that the Applicant should not receive the benefit of tax deductions which I interpolate were the result of an alleged manipulation of the tax system and that any compensation should take into account tax benefits the Applicant has achieved from carrying on a business. In my view the taxation issue is not an issue which is properly dealt with here, that is a matter for the Taxation Office. I reject the argument that is advanced by Mr Randles of Counsel who appeared for the Applicant that he should be entitled to four weeks pay; the argument of Mr McCorry being more cogent in my view properly applying the facts to the law in *Boganovich*. For those reasons an order will issue that the Applicant was unfairly dismissed, that reinstatement would be unavailing and he should be paid compensation for two weeks pay at 38 hours per week at the rate of \$26.40 per hour making a total of \$2006.40.

2004 WAIRC 10915

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MURRAY ROSS HIGGINS	<b>APPLICANT</b>
	-v-	
	PAUL ANDREW BENNETT AND CRAIG BRADLEY DIX TRADING AS FINESSE PAINTING & PROPERTY MAINTENANCE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J F GREGOR	
<b>DATE</b>	FRIDAY, 19 MARCH 2004	
<b>FILE NO</b>	APPLICATION 1251 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10915	
<b>Result</b>	Unfairly dismissed. Compensation awarded	

*Order*

HAVING heard Mr A. Randles (of Counsel) who appeared on behalf of the Applicant and Mr G. McCorry who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

1. THAT the Applicant was unfairly dismissed.
2. THAT reinstatement would be unavailing.
3. THAT the Applicant be paid compensation of \$2006.40.

[L.S.]

(Sgd.) J F GREGOR,  
Commissioner.

2004 WAIRC 10976

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CRAIG LOVATT HISLOP	<b>APPLICANT</b>
	-v- MICK STRONACH	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J F GREGOR	
<b>DATE</b>	FRIDAY, 26 MARCH 2004	
<b>FILE NO</b>	APPLICATION 1631 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10976	

<b>Catchwords</b>	Contractual benefits – Hearing in absence of Respondent – Enforcement of existing rights – Powers to be exercised in accordance with principles governing exercise of similar powers in judicial tribunals – <i>Industrial Relations Act, 1979 – s.27, s.29</i>
<b>Result</b>	Compensation awarded
<b>Representation</b>	
<b>Applicant</b>	Mr C.L. Hislop appeared on his own behalf
<b>Respondent</b>	No appearance

*Reasons for Decision*

- 1 The Commission has power under s.27 of the *Industrial Relations Act, 1979* (the Act) to proceed and hear a matter in the absence of a party if the Commission decides that it is just to do so. It is not a power to be exercised lightly as has been described by the Commission, particularly a decision of the Full Bench in *Grosvenor Pty Ltd trading as Harvey World Travel Sorrento Quay v M. Buckley* (1997) 77 WAIG 203. In that decision the powers of the Commission as are set out in s.27(1)(d) were explored by His Honour the President and by Senior Commissioner Fielding as he then was.
- 2 Relevantly the section provides:  
*"The Commission is empowered to proceed to hear and determine a matter or part thereof in the absence of any party who has been duly summoned to appear or duly served with a notice of proceedings."*
- 3 What the Full Bench found in *Buckley's* case that case was that the Commission either has a hearing or it does not. It cannot hear from one party viva voce and allow the other party to answer in writing. It either has a hearing in which it has the benefit of evidence from both sides or it reaches a decision that the failure of the Respondent to appear is so obviously at odds with its responsibilities to appear that it should exercise its discretion and deal with the matter in their absence.
- 4 In the reasons of Senior Commissioner Fielding it is made clear that there has to be a good and valid reason for an adjournment otherwise the Commission should proceed to hear matters, bearing in mind its obligations under the Act to act with expedition. Whether it does or not depends upon the facts in the matter. The facts in this matter are as follows.
- 5 The application was filed in the Registry on 17<sup>th</sup> November 2003. The Respondent never filed a Notice of Answer. The Commission then referred the matter to Deputy Registrar Wickham for conciliation under a standing authority from myself. That referral was made on 15<sup>th</sup> January 2004 and on that date a notice of conference time and venue was sent to the Respondent at Midvale Tavern, Midvale. It came to pass that was the wrong address and an advice was posted by registered mail on 16<sup>th</sup> January 2004. The receipt for that mail is contained in the file. The new time for the conference was 10.30 am on 10<sup>th</sup> February 2004.
- 6 There was a further contact on 3<sup>rd</sup> February 2004 when a further advice for the 10<sup>th</sup> February 2004 was sent out. The Respondent rang the Commission on or about 22<sup>nd</sup> February 2004 and advised Ms Myers, the Chamber Liaison Officer, that he had been away and only recently received the notice. He could not attend the conference and was seeking legal advice. At that time he gave a new mailing address. The conference was adjourned and re-listed for 3<sup>rd</sup> March 2004. That letter advising the new conference date, time and venue was forwarded on 24<sup>th</sup> February 2004 addressed to the Respondent, Mr Stronach, care of Farmers Carbon International at a post office box number in Midland.
- 7 There was a re-listing for 15<sup>th</sup> March 2004. On 26<sup>th</sup> February 2004 the Applicant demanded the matter be listed for hearing as he asserted, in his view, that Mr Stronach was deliberately delaying the matter. That view was conveyed to me and I decided the matter would be listed for hearing and the conference vacated.
- 8 On 26<sup>th</sup> February 2004, Madam Associate rang the Respondent advising the conference was vacated and the matter would proceed directly to hearing. The Respondent told her that he would be seeking legal representation. The substance of that telephone call was confirmed in writing on 2<sup>nd</sup> March 2004. In the confirmation, Madam Associate confirmed that the conference would be vacated and included these words, *inter alia*, in her letter:  
*"As you indicated you will be seeking legal representation, please advise whether your counsel will be available approximately one day on the 22nd and 23rd of March 2004.*  
*"Should those dates not be convenient, please advise of available dates within the next 4 to 5 weeks. Should no advice be received by the 8th of March the matter will be listed at the Commission's convenience."*
- 9 There was no response by 9<sup>th</sup> March 2004 and Madam Associate listed the matter for the 22<sup>nd</sup> March 2004. The notices were posted on 9<sup>th</sup> March 2004 for that hearing. The notice of hearing appears on the file. It contains the stamp of the registry. The Act provides that there is good service if the notice of hearing is posted by prepaid post. In this case a notice was sent to two addresses for the Respondent, one care of Farmers Carvon International and the other care of the Medina Tavern, 23 Pace Road, Medina.
- 10 On 19<sup>th</sup> March 2004, Ms Myers received a call from the Registry at approximately 11.30am to say that Mr Stronach, the Respondent, was at the Registry and had requested a copy of the application. A copy was made and Ms Myers handed it to Mr Stronach. He advised that he was taking the application to a lawyer but he did not indicate who would be representing him even though he was asked to supply that information.

- 11 On 22<sup>nd</sup> March 2004 the Commission received a telephone call from a person who identified himself as "Titus O'Halloran", this person being a person unknown to the Commission, not in possession of a warrant to appear as agent and not identifying himself as counsel but identifying himself as a person who knew the Respondent. He told the Commission that "the Respondent could not attend the hearing because he had chest pains" and he either has gone or may go to hospital.
- 12 The preceeding is a summary of the facts that the Commission has before it. Normally, if the Commission was advised that someone was ill or hospitalised, it accepts on the face value that information to be confirmed later. In this case there was no indication of the hospital that the Respondent was going to be taken to in fact no other information at all.
- 13 This application for an adjournment, if one can call it that, it not made by a person who holds a warrant to appear as agent or who is a solicitor, comes on the end of a history which has indicated a lack of attention to resolving this matter by the Respondent. The history exhibits a constant and continuing lack of attention by the Respondent to attending the Commission when required by Notices of Hearing and to otherwise make himself available to deal with a claim. This conduct must erect in the mind of the Commission some doubts as to the probity of the information which is before the Commission, absent more substantive proof.
- 14 In these circumstances, even though it may be regarded as normal for the Commission in the face of an illness to adjourn the matter, this is not a situation, in my analysis, that is normal. It appears to be the continuation of a series of excuses that the Respondent has proffered on a number of different occasions when attempts have been made to bring this matter to hearing and conference. I intend to exercise the powers contained in s.27(1)(f). I do so understanding that these proceedings involve enforcement of existing legal rights and that powers must be exercised in accordance with the principles governing the exercise of similar powers in judicial tribunals. Having that in mind, I intend to hear the Applicant's case and that means I am exercising a discretion to hear it in the absence of the Respondent.
- 15 Craig Lovatt Hislop (the Applicant) filed an application in the Commission seeking orders pursuant to s.23A of the Act on 17<sup>th</sup> November 2003. He has given evidence that he did so because at the end of a contract of employment with Mick Stronach (the Respondent) he had not been paid moneys to which he was entitled under a contract of employment, that contract of employment not being subject to an award or order of the Commission.
- 16 The Applicant says that he made an arrangement to work for Mr Stronach as a stable hand looking after horses. He had entered in an arrangement which required that an amount of money for wages in the sum of \$240.00 a week would be paid by Mr Stronach as rental to the landlords of a property at 19 Epsom Avenue, Ascot on behalf of the Applicant. This is an unusual way of reimbursing a contract of services but nevertheless it is not unheard of. The Applicant, to support his contentions that such an arrangement was made, called evidence from the landlords of the property Mr Berwick Pangello and Mr Joseph Taliano. Those two gentlemen gave evidence that, together with one, Tania Kennedy, who apparently is a partner of Mr Pangello, they are the owners of the property at 19 Epsom Avenue, Ascot. They had been involved in renovating the property and were approached by Mr Stronach to see whether they would accept Mr Hislop as a tenant with Mr Stronach paying an amount for 4 weeks' bond and 2 weeks' rent in advance with a weekly rate of \$240.00 per week.
- 17 Both Mr Taliano and Mr Pangello say they personally witnessed the arrangement being made between Mr Stronach and Mr Hislop. They have both, under oath, told me that since 18<sup>th</sup> July 2003 they have not been paid any of the money nor to their knowledge has Mr Hislop. Mr Taliano told me that there had been at least allegedly five occasions to recover the money. Each time Mr Stronach had promised to pay and never has.
- 18 The Applicant, to launch this application, must have standing under s.29(1) of the Act. He is asking the Commission to issue orders under s.23A by virtue of jurisdiction conferred by s.29(1)(b)(ii) of the Act. For him to have standing he must have been an employee. As far as I can tell from the evidence there is a strong view that he was in fact an employee. This is supported by his evidence and the evidence of his two witnesses. What he has to prove is that he has not been allowed by as an employee a benefit, not being a benefit under an award or order to which he is entitled under his contract of employment.
- 19 The contract of employment in this case was unusual but the evidence indicates to me that it is very much in the terms set out in the letter of demand in Exhibit H1. That letter details the arrangement and claims there was a sum of \$4800 which for which Mr Stronach was responsible for rental and board for a period between 11<sup>th</sup> April 2003 and 18<sup>th</sup> July 2003. This rental was the wages for work which was performed by Mr Hislop, those wages to be paid in the form of a rental on a property at 19 Epsom Avenue, WA. The payment was to be made direct to the landlords who were Berwick Pangello, Tania Kennedy and Joseph Taliano and the agreement was claimed to be made in front of Messrs Pangello and Taliano. Having heard the evidence from both of those gentlemen I have reached the conclusion that the contract was in the form set out in the letter of demand. I have also reached the conclusion, on the evidence available to me here, having decided that Mr Pangello and Mr Taliano are witnesses of truth, that they have not been paid the money and therefore the wages for the work which was performed between 7<sup>th</sup> April 2003 and 18<sup>th</sup> July 2003 have not been paid.
- 20 Having made that finding the Commission reaches the conclusion that Mr Hislop has not been allowed by Mr Stronach a benefit to which he is entitled under his contract of employment and an order will issue for that to be done. The order will require that an amount of \$4800.00 be paid by the Respondent to the Applicant within 7 days. Those orders will issue in due course.

2004 WAIRC 11014

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	CRAIG LOVATT HISLOP	<b>APPLICANT</b>
	-v-	
	MICK STRONACH	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J F GREGOR	
<b>DATE</b>	THURSDAY, 1 APRIL 2004	
<b>FILE NO</b>	APPLICATION 1631 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11014	

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**Result** Compensation awarded

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*Order*

HAVING heard Mr C.L. Hislop who appeared on his own behalf and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the Respondent pay the Applicant the sum of \$4,800.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid, within seven days of the date of this order.

(Sgd.) J F GREGOR,  
Commissioner.

[L.S.]

**2004 WAIRC 10914**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	NATALIE MARGARET JACOBS	<b>APPLICANT</b>
	-v-	
	SH MA AND TMP MA TRADING AS JACARANDA LUNCHBAR	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE</b>	MONDAY, 22 MARCH 2004	
<b>FILE NO</b>	APPLICATION 1095 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10914	

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<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Whether dismissal or resignation – Intent of parties considered – No dismissal at the initiative of the employer – Commission lacks jurisdiction – Application dismissed – <i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(i)
<b>Result</b>	Application alleging unfair dismissal dismissed
<b>Representation</b>	
<b>Applicant</b>	Ms N Jacobs on her own behalf
<b>Respondent</b>	Mr D Cheah (as agent)

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*Reasons for Decision*

1 This is an application by Natalie Margaret Jacobs (the “applicant”) pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* (the “Act”). The applicant alleges that she was unfairly terminated from her employment with SH Ma and TMP Ma trading as Jacaranda Lunch Bar (the “respondent”) on 10 July 2003. The respondent denies that it terminated the applicant and argues that the applicant resigned of her own accord.

Background

- 2 The applicant commenced employment with the respondent on 15 November 2002 as a kitchen and counter hand. In addition to kitchen and counter duties, the applicant undertook cleaning, serving and stocking goods.
- 3 The applicant was employed for approximately 17½ hours per week on a casual basis pursuant to the terms and conditions of the *Restaurant, Tearoom and Catering Workers’ Award No R48 of 1978* (the “Award”). The applicant regularly worked from 10:00am to 1:30pm Monday to Friday, excluding public holidays. The applicant’s time and wages records confirm this pattern of work (Exhibit R4).
- 4 When the applicant commenced employment with the respondent she filled out a tax declaration form confirming that she was to be paid as a casual employee (Exhibit R3). The applicant’s employment went without incident until 9 July 2003 when an altercation occurred between the applicant and one of the respondent’s owners, Mr Sang Hue Ma.

Applicant’s evidence

- 5 The applicant stated that at approximately 11:30am on Wednesday, 9 July 2003, she had finished her normal jobs to that point and as there were no customers in the lunch bar she went to the back of the lunch bar to smoke a cigarette. The applicant stated that she only started taking cigarette breaks at the beginning of that week and that Mr Ma had not raised any issue with her that week about taking smoking breaks.
- 6 When the applicant was smoking behind the lunch bar on 9 July 2003 Mr Ma approached the applicant and told her that he did not like her having a cigarette break and that he would not pay the applicant for time spent smoking. The applicant told Mr Ma that she had no problem with not being paid when she took a smoking break. The applicant also told Mr Ma that she understood she was entitled to a 10 minute smoking break every two hours as she was allowed to take a smoking break in a previous job. Mr Ma disagreed with the applicant’s view that she was entitled to a smoking break and this led to a verbal altercation between the applicant and Mr Ma. As a result of this altercation Mr Ma then asked the applicant “Would you like to go home for the day or do you want to stay?”. The applicant replied “Look, I’m going to go home.” (transcript page 8). As Wednesday was the applicant’s normal payday, Mr Ma gave the applicant her weekly wages including the hours she had worked that day and the applicant then left the respondent’s premises without completing the rest of her shift.

- 7 When the applicant arrived home she contacted Wageline to clarify her entitlement to a smoking break. During this conversation she discovered that the casual wage rate that the respondent had been paying her was less than the amount to which she was entitled. She also discovered that she was not entitled to a paid smoking break.
- 8 The applicant rang Mr Ma that afternoon and apologised to him for her misunderstanding about being entitled to a smoking break and she also told Mr Ma that she was being underpaid. Mr Ma said he would look into the underpayment and the applicant told Mr Ma that she would see him the following day.
- 9 On 10 July 2003 the applicant turned up for work as normal. When the applicant presented at work Mr Ma told her that the respondent no longer required her services as work was not busy due to the school holidays coming up. The applicant stated that lack of work being available during school holidays had never been an issue previously raised with her by the respondent. The applicant stated that she was not happy about Mr Ma's decision not to allow her to work during school holidays but at the time she accepted that work was not available for her at the lunch bar. The applicant then told Mr Ma that she would return to work on 21 July 2003 once school holidays had finished. Mr Ma then advised the applicant that her services would not be required on that date and that he would contact her when he required her to return to work. The applicant wanted to discuss the issue further with Mr Ma at the time but he stated that he was too busy. After Mr Ma paid the applicant the back-pay owing to her the applicant then left the respondent's premises. The applicant confirmed that she did not work that day.
- 10 On 10 July 2003 the applicant was advised by Legal Aid that she had a possible unfair termination claim and that she could well have been employed on a part-time and not a casual basis. This led to the applicant writing to the respondent to that effect on 11 July 2003 (Exhibit R1).
- 11 Several days after writing this letter Mr David Cheah, the respondent's accountant, rang the applicant on behalf of the respondent to discuss what had happened between the applicant and Mr Ma. The applicant maintained that Mr Cheah did not attempt to resolve the dispute between her and Mr Ma.
- 12 Under cross-examination the applicant confirmed that she did not seek permission to have a cigarette break on 9 July 2003. The applicant was adamant that she did not resign from her employment with the respondent on 9 July 2003. She also stated that during her discussion with Mr Ma on that day he gave her the option of either remaining at work that day or leaving.
- 13 She stated that it would not have been possible for Mrs Ma or another employee Ms Kylie Gray to hear the discussion with Mr Ma on 9 July 2003 because Ms Gray and Mrs Ma were approximately 15 feet away having a conversation. The applicant stated that Ms Gray continued to serve customers at the front of the shop and the radio was on at the time of her altercation with Mr Ma.
- 14 Since ceasing employment with the respondent the applicant confirmed that she has not been contacted by the respondent about further work. The applicant has been studying part-time and she has applied for approximately 10 jobs in the funeral industry. On 7 November 2003 she commenced a cleaning position working 12 to 15 hours per week. She is currently earning approximately \$100 per week less than what she was earning when employed by the respondent.

#### Respondent's evidence

- 15 Mr Ma stated that on the morning of 9 July 2003 Mrs Ma told him that the applicant was at the back of the lunch bar having a cigarette. This was the first time that Mr Ma was aware that the applicant was taking cigarette breaks. As there was work to be done, Mr Ma approached the applicant and asked her to return to her duties. The applicant told Mr Ma that she was entitled to have a break. Approximately five minutes later, after the applicant had finished her cigarette, she returned inside the lunch bar. Whilst Mr Ma and the applicant were in the kitchen area Mr Ma told the applicant that he needed someone to work and that she was not entitled to have a cigarette break. He stated that this discussion took place approximately three metres from the serving counter. Mr Ma stated that he said to the applicant "Natalie, please could you come in and start to work?" The applicant told Mr Ma "No, I have to finish my smoke" to which Mr Ma replied "No you can't do that." He stated that the applicant did not come back into the kitchen after he asked her to do so. When the applicant returned inside the lunch bar Mr Ma said "We here just a small shop. We need everybody work. I can't afford to, you know, because we got another staff. ... if you say you still want to smoke, I'm sorry, I can't afford to pay you that, you know." The applicant then told Mr Ma that she wanted to be paid her wages up to that day. The applicant took her wages and then left the respondent's premises. Mr Ma understood that in doing so the applicant had resigned.
- 16 At approximately 1:30pm in the afternoon of 9 July 2003 the applicant rang Mr Ma and apologised for what she claimed to be a misunderstanding about being entitled to cigarette breaks. She also told Mr Ma about wages she claimed were owing to her. Mr Ma told the applicant he would get his accountant to calculate the amount owing and pay her. The applicant told Mr Ma that she would see him the next day and Mr Ma agreed to meet with her then. Mr Ma understood that the applicant was only coming in the next day to pick up the cheque for the wages owing to the applicant.
- 17 When the applicant came into work at her normal time on 10 July 2003 Mr Ma told her that she was not to work that day. He also told the applicant that he understood she had resigned the day before. The applicant waited for the wages owing to her to be worked out and she left after the back pay was given to her. Mr Ma advised the applicant that business was not busy due to school holidays and that he would contact the applicant if she was needed in the future.
- 18 Mr Cheah confirmed that after the respondent received the letter dated 11 July 2003 from the applicant seeking re-instatement and raising the issue of her employment status he contacted the applicant on behalf of the respondent on 14 July 2003 to see if the dispute between the applicant and the respondent could be settled. He asked the applicant if she wanted to return to work with the respondent and the applicant indicated that she was not interested in coming back and that she wanted compensation instead.
- 19 Ms Gray is employed by the respondent to undertake kitchen hand duties and to serve customers. She works from 9:30am to 1:30pm each day. Ms Gray stated that on 9 July 2003 whilst she was working at the preparation bench she overheard parts of a discussion between Mr Ma and the applicant. Ms Gray heard Mr Ma tell the applicant to go back to work and forget about what had occurred or take the cheque and leave and find an employer who would give her paid cigarette breaks. Ms Gray understood that the applicant then picked up a cheque and left the respondent's premises without a fuss. Ms Gray was surprised that the applicant had left prior to completing her shift because Ms Gray had to leave work that day to attend a doctor's appointment.
- 20 Ms Gray confirmed that she signed a statement on 31 July 2003 giving a summary of what she understood occurred between the applicant and Mr Ma on 9 July 2003. She stated that she did not write this statement but she agreed with the contents contained in the statement. She stated that she was approximately one to two metres away from Mr Ma and the applicant whilst their conversation took place on 9 July 2003.
- 21 Under cross-examination Ms Gray agreed that the radio was playing during the applicant's conversation with Mr Ma on 9 July 2003 and that she may have been serving customers when this conversation took place.

Submissions

- 22 The applicant submits that she did not resign on 9 July 2003 as a result of the incident with Mr Ma about taking smoking breaks, nor did she demand to be paid for taking smoking breaks. The applicant stated that after her discussion with Mr Ma he gave her the option of leaving work that day. In doing so it was the applicant's understanding that she was to return to work as normal the following day.
- 23 The respondent submits that the applicant resigned on 9 July 2003 and was therefore not unfairly terminated. The applicant requested the balance of her wages in the middle of the shift for that day and then left the respondent's premises, as corroborated by the evidence of Ms Gray.

Findings and conclusionsCredibility

- 24 It is my view that all witnesses gave their evidence to the best of their recollection. Even though different versions of what was discussed between Mr Ma and the applicant on 9 July 2003 were given by each witness, I do not find this critical to the outcome of this application.

Was the applicant terminated?

- 25 In this particular case there needs to be a determination as to whether or not a dismissal occurred at the initiative of the employer.
- 26 In *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200 at 205, the Full Court of the Industrial Relations Court of Australia said:

"termination at the initiative of the employer" involves a "termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship".

"[A]n important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have been remained in the employment relationship". See Macken, McCarry and Sappideen's Law of Employment 4<sup>th</sup> Edition page 227-228.

- 27 On the evidence before me I find that the applicant resigned from her employment on 9 July 2003 as a result of the altercation she had with Mr Ma over the applicant's right to take paid smoking breaks. The main issue in dispute is whether or not the applicant left the respondent's premises after her altercation with Mr Ma on 9 July 2003 at her own instigation and if so whether this amounted to a resignation by the applicant. Even though the applicant claims Mr Ma gave her the option of leaving on 9 July 2003 and the applicant took up this invitation expecting to return to work as normal the following day, the weight of evidence is against the applicant's claim that she did not resign when she left the respondent's premises on 9 July 2003 prior to finishing her normal shift. It may well be the case that the applicant understood that subsequent to the altercation with Mr Ma on 9 July 2003 she could return to her previous position with the respondent the next day. I find it hard to accept however that the applicant left the respondent's premises on 9 July 2003 at Mr Ma's instigation. It is unusual for an employee to leave his or her job during the middle of a shift. Further, it is my view Mr Ma would not have wanted the applicant to leave in the middle of her shift as Ms Gray had a doctor's appointment that day which would have left the respondent short staffed. After the altercation with Mr Ma I conclude that the applicant believed that she was being harshly treated by Mr Ma by not being allowed to take a smoking break. I find that as a result the applicant decided that she no longer wished to continue being employed by the respondent and left the respondent's premises without completing her normal shift for that day which in my view amounted to a resignation by the applicant. I accept Mr Ma's evidence that he took the view that the applicant had resigned on 9 July 2003 when she left the respondent's premises after she was given the option to do so by him and that Mr Ma only agreed to meet with the applicant the following day so that the wage underpayment issue could be resolved.
- 28 It was not in dispute that both the applicant and the respondent regarded their employment relationship to be casual in nature and that the applicant was paid and treated as a casual employee. In this case I find that as the applicant and the respondent regarded the employment relationship as being casual this led to the applicant leaving the respondent's premises on 9 July 2003 without giving notice and without completing her full shift on that day and that this behaviour was accepted by the respondent. The casual nature of the applicant's employment with the respondent is in my view reinforced by the applicant accepting Mr Ma's proposal that she return to work at the lunch bar when the respondent's business improved.
- 29 As I have found that the applicant resigned of her own accord and was not terminated by the respondent on 9 July 2003 there is therefore no jurisdiction for the Commission to deal with this application.
- 30 An Order will now issuing dismissing the application.

2004 WAIRC 10913

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

NATALIE MARGARET JACOBS

**APPLICANT**

-v-

SH MA AND TMP MA TRADING AS JACARANDA LUNCHBAR

**RESPONDENT****CORAM**

COMMISSIONER J L HARRISON

**DATE OF ORDER**

MONDAY, 22 MARCH 2004

**FILE NO/S**

APPLICATION 1095 OF 2003

**CITATION NO.**

2004 WAIRC 10913

**Result**

Application alleging unfair dismissal dismissed

*Order*

HAVING HEARD Ms N Jacobs on her own behalf and Mr D Cheah as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

**2004 WAIRC 11087**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MICHAEL STEVE MALDONADO	<b>APPLICANT</b>
	-v-	
	WELDLOK INDUSTRIES PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	WEDNESDAY, 7 APRIL 2004	
<b>FILE NO</b>	APPLICATION 338 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11087	
<hr/>		
<b>Result</b>	Application out of time dismissed.	
<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – <i>Industrial Relations Act 1979</i> (WA) s29(1)(b)(i),(2)&(3)	
<b>Representation</b>		
<b>Applicant</b>	Mr M.S. Maldonado	
<b>Respondent</b>	Mr S. Nugent	

*Reasons for Decision*

- 1 On 12 March 2004 Mr Maldonado referred his claim that he was harshly, oppressively or unfairly dismissed from his employment to the Commission. His employment terminated on 9 February 2004. By s.29(2) of the *Industrial Relations Act 1979* his application needed to have been lodged no later than 28 days after the day his employment terminated and accordingly his application is four days out of time. By s.29(3) of the Act the Commission may accept his referral if it would be unfair not to do so.
  - 2 The Commission therefore listed the application for hearing in order to allow him and Weldlok Industries Pty Ltd (the respondent) an opportunity to address the Commission on whether or not it would be unfair not to accept his application. Mr Maldonado appeared on his own behalf and gave evidence. The respondent was represented by its WA Manager, Mr Nugent. Mr Nugent also gave evidence.
- Background
- 3 According to those parts of Mr Maldonado's Notice of Application which are not challenged, he was employed as a second class welder making handrails from 16 July 2003. He appears to have been a full-time employee. From the information contained in the respondent's Notice of Answer, Mr Maldonado did not attend for work for the three working days between Wednesday 4 February and Friday 6 February 2004.
  - 4 Mr Maldonado's evidence was that he did not attend work because he had a piece of metal in his eye, although at first he did not realise it was a piece of metal. Significantly, he stated that he telephoned his leading hand, Mr Cooley, on the first day of absence, Wednesday 4 February 2004. Mr Nugent's evidence was not only that no telephone call was received, but that no other management employee, including Mr Cooley himself, received a telephone call from Mr Maldonado. Mr Nugent informed the Commission that if this matter went to a hearing, Mr Cooley's evidence will be that Mr Maldonado did not telephone him.
  - 5 On Monday 9 February 2004 Mr Maldonado did not attend for work and the Operations Manager Mr Newman telephoned Mr Maldonado. The Commission was informed that Mr Newman's evidence will be that Mr Maldonado told him that he had a cold and, when asked why he had not telephoned in sick, Mr Maldonado replied "yes I should have". Mr Newman stated that this was not good enough and the respondent would have to "let him go". Mr Newman's evidence will be that Mr Maldonado replied "OK, no problems". Mr Maldonado's evidence in the Commission was that he did tell Mr Newman that he had telephoned Mr Cooley. When Mr Newman told him he was being "let go" Mr Maldonado said that he could not believe it. He stated that Mr Newman then stated that if Mr Maldonado came in with doctor's certificates he would be able to "rectify the situation". Mr Nugent informed the Commission that Mr Newman's evidence would be that he did not say those words.
  - 6 On Wednesday 11 February 2004 Mr Maldonado came into the respondent's office. Mr Newman was then in Sydney and Mr Nugent himself then spoke with Mr Maldonado. In the Notice of Answer, the respondent states that Mr Nugent asked Mr Maldonado what had happened and that Mr Maldonado replied that he understood the respondent's situation and "there was no excuse". Mr Nugent's evidence in the Commission was that he shook Mr Maldonado's hand and said words to the effect that "all it would have taken was a simple telephone call" and that Mr Maldonado replied "I know, no excuse". Mr Nugent said this statement was made in front of the administration clerk/receptionist who is able to give evidence that that was said. Mr Maldonado denied that that was said.
  - 7 Mr Maldonado showed Mr Nugent the doctor's certificates and Mr Nugent took copies of them and told Mr Maldonado that the respondent would pay him sick leave by way of a local cheque as the termination payment was already going through the system with the normal weekly pays. He advised Mr Maldonado that a separation certificate would be provided from the

payroll department in Sydney. Mr Nugent's evidence was that the meeting was very cordial and friendly and Mr Maldonado did not dispute that evidence.

- 8 It is agreed that there was then a delay before the respondent provided the separation certificate. The respondent said that it arrived on 26 February 2004. Mr Maldonado, while not disagreeing with that date, is not able to remember precisely when it arrived. Mr Maldonado objected to the separation certificate stating that he had "abandoned employment". He states in his Notice of Application that "for that reason it affects my Centrelink benefit which is unfair".
- 9 Mr Maldonado's evidence was that he did not consider claiming unfair dismissal until after he had received the separation certificate and also after he had spoken to an ex-employer. It is not clear when he spoke to that ex-employer. His evidence was that the ex-employer thought that his dismissal had been unfair. As a consequence, Mr Maldonado then sought legal advice but this "took a little while" and his application was therefore late in being referred to the Commission. He acknowledged that it took too long for him to see a legal advisor.
- 10 Both Mr Maldonado and Mr Nugent made brief closing submissions. Mr Nugent stated that the issue was one of fairness and the respondent did not suffer any particular prejudice from the delay which had occurred. The respondent took the matter seriously because it affected Mr Maldonado's earning capacity and livelihood. Mr Nugent drew attention to the respondent employing 34 people plus approximately 10 casuals. He submitted that the respondent's employment record is "outstanding". The respondent also, in its Notice of Answer, drew attention to the fact that at no stage has Mr Maldonado indicated that there has been a workers' compensation issue, nor was any claim made, even if he did attend doctor's rooms on 4, 5 and 9 February 2004 as the certificates state.
- 11 Mr Maldonado stated that he is not the kind of person to take things "that far" in relation to claiming unfair dismissal. He believes that even if this application is not successful, the respondent will "know now not to treat its employees like that".
- 12 In assessing whether it would be unfair not to accept the application, the Commission considers a number of factors. The recent decision of the Industrial Appeal Court in *Malik v. Paul Albert, Director General, Department of Education* (delivered 1 April 2004, [2004] WASCA 51) makes it clear that special circumstances are not necessary before the Commission will accept a referral out of time but the Commission must be positively satisfied that the 28 day period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation for the delay which makes it equitable to accept the referral out of time.
- 13 From the above facts I have reached the following conclusions.

#### The delay

- 14 The delay is four days. That is not a significant period of time although the fact remains that the 28 day period is to be complied with unless there is an acceptable explanation for the delay. In this case, I am not satisfied that there is an acceptable explanation. From the evidence, it is clear that Mr Maldonado only considered that his dismissal was sufficiently unfair to think of doing anything about it after he had spoken to an ex-employer. Even though Mr Maldonado now says that the writing on the separation certificate was "the last straw", it was not until he spoke to the ex-employer that he considered his dismissal was unfair. He did nothing until that date which suggests that he thought his dismissal was unfair. Furthermore, I am left with the impression from his evidence that the reason why he thought it was unfair is because the ex-employer thought it was unfair.
- 15 Further, while the respondent was at fault in not providing the separation certificate promptly, Mr Maldonado acknowledges that he still had 11 days after receiving it to do something about his belief that he was unfairly dismissed. It is not clear from his evidence precisely when the discussion occurred with the ex-employer, when he sought legal advice or, presuming he was given legal advice, when that advice was given to him in relation to when the claim was lodged.
- 16 I am therefore left with the conclusion that Mr Maldonado's explanation for the delay does not provide an acceptable explanation which would make it equitable to accept his application.
- 17 I note also that no other action was taken by Mr Maldonado to contest his dismissal. For example, at no stage prior to referring the claim to the Commission, did he contact the respondent to discuss the matter with them or even to inform them of his intention to challenge the dismissal. Had he done so within the 28 day period, his argument that it would be unfair not to accept his claim would be on stronger ground. As it is, he took no such action.

#### The likely merit of the claim

- 18 Both Mr Maldonado and Mr Nugent referred to the evidence which may be brought regarding the merit of the claim, particularly whether Mr Maldonado did, or did not, ring on the first day of his absence. There is no point in accepting Mr Maldonado's claim if it has no prospect of success, so some assessment of the likelihood of success is appropriate in this case. Of necessity, it will be only a preliminary assessment based on the limited material before the Commission: the Notice of Application, the Notice of Answer and the brief evidence of both Mr Maldonado and Mr Nugent.
- 19 Both Mr Maldonado and Mr Nugent have some disagreement over the facts of what occurred. These proceedings are not designed to address those differences but rather merely to identify them. The essential reason for the dismissal is the respondent's understanding that Mr Maldonado did not telephone them after three days' absence and that it took a telephone call from the operations manager on the fourth working day before they knew of Mr Maldonado's circumstances. Mr Maldonado says that he did telephone Mr Cooley. However, if, as appears likely from these proceedings, Mr Cooley's evidence will be that no telephone call was received, then the Commission will only have Mr Maldonado's word against that of Mr Cooley. Mr Maldonado did state that he would endeavour to produce his telephone records to show that the call was made. Even so, the essential evidence of Mr Maldonado that he did telephone Mr Cooley is a point in serious dispute and it is not clear that Mr Maldonado's evidence will be borne out.
- 20 Mr Maldonado's evidence also will be viewed against the likely evidence to be given by Mr Nugent, and by the administration clerk/receptionist, that Mr Maldonado stated on Wednesday 11 February 2004 in the respondent's premises that he did understand the respondent's situation and he had no excuse for not telephoning. Further, Mr Newman's evidence will be that when on Monday 9 February 2004 he telephoned Mr Maldonado and asked why he had not phoned in, Mr Maldonado replied "yes I should have". Faced with this evidence, it is certainly not clear that Mr Maldonado's claim that he did inform the respondent, via Mr Cooley, that he had something in his eye, will be successful. Accordingly, Mr Maldonado's claim does not have good prospect of success.
- 21 I have little difficulty in agreeing with Mr Maldonado in principle that to dismiss a person who is genuinely ill or injured because they are ill or injured is likely to be unfair and subject to correction by this Commission. However, Mr Maldonado was not dismissed because he was ill or injured, but rather that he failed to ring in after three complete days, and not at the commencement of the fourth day, of work. In that context, the statement on the separation certificate that he had "abandoned employment" is arguably correct from the respondent's point of view.

Prejudice to the respondent

- 22 Prejudice to the respondent, including prejudice caused by the delay, will go against accepting Mr Maldonado's claim.
- 23 The respondent states in the Notice of Answer that the whole situation is "time consuming and non-productive from our point of view". In evidence, Mr Nugent did not add to that statement nor place anything further before the Commission by way of prejudice to the respondent if the claim is accepted. The prejudice to the respondent is therefore the time and trouble involved in having to defend a claim which, from the respondent's perspective, is not likely to be successful.
- 24 The respondent should nevertheless be prepared to defend its action if it dismisses an employee. Even if, ultimately, an employer is found not to have unfairly dismissed an employee, the right of an employee to challenge a dismissal is important in our society given, as Mr Nugent recognised, a dismissal directly affects an employee's earning capacity and livelihood. Indeed, that may well sum up the corresponding prejudice to Mr Maldonado if his claim is not accepted by the Commission. His earning capacity and livelihood is lost and he will be denied the opportunity to seek compensation (he does not seek reinstatement) for the loss or injury caused by the dismissal.
- 25 There is therefore some prejudice to the respondent if Mr Maldonado's claim is accepted, although not a significant prejudice.

Consideration of fairness as between the applicant and other persons in a like position

- 26 It is not inaccurate to say that there are many claims of unfair dismissal referred to this Commission. Applicants who take the steps open to them to refer a claim to the Commission within the 28 day period are entitled to have their claims heard as promptly as the limited resources of the Commission will allow. I consider it more than likely that an employee in a similar position to Mr Maldonado would have taken steps to investigate whether or not the dismissal should be contested well before the time when Mr Maldonado took the steps which he did. I consider it far more likely that if his dismissal on 9 February 2004 was as unfair as he now states, he would have taken at least some steps to investigate the options open to him to challenge it. I do not consider it is fair in that context for Mr Maldonado's claim to be accepted out of time.

Conclusion

- 27 On a consideration of all of the matters above, it could not be said that Mr Maldonado has positively satisfied the Commission that it would be unfair not to accept his claim of unfair dismissal and accordingly it will now be dismissed.
- 28 Order accordingly.

2004 WAIRC 11086

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MICHAEL STEVE MALDONADO	<b>APPLICANT</b>
	-v-	
	WELDLOK INDUSTRIES PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	WEDNESDAY, 7 APRIL 2004	
<b>FILE NO</b>	APPLICATION 338 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11086	

<b>Result</b>	Application out of time dismissed.
<b>Representation</b>	
<b>Applicant</b>	Mr M.S. Maldonado
<b>Respondent</b>	Mr S. Nugent

*Order*

HAVING HEARD Mr M.S. Maldonado on his own behalf as the applicant and Mr S. Nugent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby order -

THAT the application be hereby dismissed.

[L.S.]

(Sgd.) A R BEECH,  
Senior Commissioner.

2004 WAIRC 11062

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	BRIAN MANGAN	<b>APPLICANT</b>
	-v-	
	HELENIKA FISHERIES	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	TUESDAY, 6 APRIL 2004	
<b>FILE NO</b>	APPLICATION 1872 OF 2002	
<b>CITATION NO.</b>	2004 WAIRC 11062	

<b>Result</b>	Application alleging unfair dismissal and denied contractual benefits dismissed for want of jurisdiction
<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Claim of denied contractual benefits – Applicant signed Share Fishing Agreement - Whether applicant an employee – Principles applied – Turns on own facts - Applicant not an employee - Application dismissed – <i>Industrial Relations Act 1979</i> (WA) s7, s29(1)(b)(i)
<b>Representation</b>	
<b>Applicant</b>	Mr B. Mangan
<b>Respondent</b>	Mrs H. Spencer and Mr B. Spencer

*Reasons for Decision*

- 1 The claim by Mr Mangan is that he was unfairly dismissed by the respondent, Helenika Fisheries, and also that he has not been paid benefits to which he is entitled under his contract of employment. The respondent states that it entered into a Share Fishing Agreement with Mr Mangan and thus it never employed Mr Mangan and the Commission does not have the jurisdiction to deal with this application. The respondent states, in the alternative, that if Mr Mangan was its employee, it did not dismiss him. Rather, Mr Mangan left its employment in order to go to Fremantle to sit for his skipper’s ticket. Further, the respondent denies that there has been any underpayment of any benefits due to him.
- 2 The Commission heard both parties in Broome. Mr Mangan represented himself. The respondent was represented by Helen and Bruce Spencer. (It appears likely that Helenika Fisheries is merely the trading name of a business operated by a company Fentosa Pty Ltd and that Mr and Mrs Spencer are connected with that company. However, the issue of the named respondent not being a legal entity was not raised before the Commission and no application was made to change the name of the respondent from that cited by Mr Mangan in his Notice of Application.)
- 3 I find the relevant facts to be as follows. On 23 September 1998 Mr Mangan and Mrs Spencer (on behalf of the respondent) signed a document entitled Share Fishing Agreement. That agreement, as it was presented to the Commission, is as follows:

“SHARE FISHING AGREEMENT

THIS AGREEMENT is made between the party or parties named in Item 1 of the Schedule (“the Owner”) and the party or parties named in Item 2 of the Schedule (“the Fisherman”).

IT IS AGREED AS FOLLOWS:

1. The Fisherman will participate as a share fisherman on the vessel named in item 3 of the Schedule (“the Vessel”) for the period set out in Item 4 of the Schedule.
2. During the currency of this Agreement, the Vessel will be used for fishing and for no other purposes.
3. The Fishermen shall bear the proportion of operating expenses of the Vessel set out in Item 5 of the Schedule, including:
  - (a) the cost of regularly maintaining the Vessel in good and seaworthy order and condition;
  - (b) the cost of fuel, oil and bait;
  - (c) repair of fishing equipment;
  - (d) general provisions for the sustenance of the crew of the Vessel;
 provided that the Fisherman shall not be responsible for;
  - (e) the costs of the annual refit of the Vessel; or
  - (f) the cost of repairs to or the replacement of any item of plant, equipment, machinery or the Vessel itself where the cost of that repair or replacement exceeds \$.....(\*Delete if not applicable)
4. The fish caught by the parties will be sold at the conclusion of each voyage to the buyer (if any) named in Item 6 of the Schedule. If no buyer is named in Item 6 of the Schedule, the fish may be sold to any buyer.
5. The Fisherman shall be entitled to the proportion of the proceeds of the sale of the fish set out in Item 7 of the Schedule.
6. This Agreement may be terminated upon not less than FOURTEEN (14) days notice by a party to each of the other parties to this Agreement, or forthwith by any party in the event of a breach of any of the terms of this Agreement.
7. Nothing in this Agreement shall be construed to grant or convey to the Fisherman any interest of any kind in the Vessel.

THE SCHEDULE

Item 1.	OWNER	Helenika Fisheries		
	Address	PO Box 5274 CABLE BEACH	WA	6726
Item 2.	FISHERMAN	Brian Thomas Mangan		
	Address	12 Miller Wy	BROOME	
Item 3.	VESSEL	Centrefold	LFB	BR20
Item 4.	PERIOD	24/9/98 – 30-6-99		
Item 5.	The proportion of the operating expenses of the Vessel payable by the Fisherman			
		.....		12.75%

- Item 6. Buyer (if any) Kailis  
 Item 7. The proportion of the proceeds of the sale payable to the Fisherman  
 .....12.75%

DATED this 24 day of September 1998

SIGNED

SIGNED by the Owner

SIGNED

SIGNED by the Fisherman

DATED this 23/9/98"

- 4 (The date of "30-6-99" in item 4 was added at a later date by Mrs Spencer. The percentages in Items 5 and 7 are written in a different pen from the pen otherwise used, although there is no issue that the percentage is not correct for this agreement. A Tax File Number has been written across the top of the Agreement.)
- 5 On 1 July 2000, 1 July 2001, 1 July 2002 Mr Mangan signed further Share Fishing Agreements. In each case, the terms of the Share Fishing Agreements are the same as set out above other than for a variation in the percentages commencing from 1 July 2002.
- 6 Mr Mangan commenced work in accordance with the Share Fishing Agreement on 24 September 1998. He described his duties as including:  
 'while at sea grappling, floats, baiting traps, lifting traps and throwing traps over the side when the skipper directed to do so. Duties also included packing the fish, unloading fish, cleaning the boat and whatever else the applicant was told to do by the skipper'.
- 7 The evidence of Mrs Spencer, which incorporated the written material which became exhibit A, includes as part of Mr Magan's duties fuelling the boat, taking on water for the next trip, unloading bait from the freight company and loading bait onto the boat. He calculated the bait required for the following trip and organised the stores.
- 8 When Mr Mangan received payment from the respondent tax was not deducted. Mr Mangan did not at any time complete an Employee Tax Declaration. Rather, Mr Mangan paid taxation pursuant to an arrangement between himself and the Australian Taxation Office at a rate of 20%. The detail of that arrangement was not provided to the Commission. There is no evidence, for example, that the arrangement was nevertheless consistent with an employment relationship between him and the respondent.
- 9 At the time of the alleged dismissal, Mr Mangan had an Australian Business Number. He did not have one at the commencement of his working relationship with the respondent due to the fact that at that time the relevant taxation legislation was not in force. I note Mr Mangan's evidence that he believed that after the legislation came into force he was legally required to have an Australian Business Number because he was a share fisherman.
- 10 Mr Mangan's evidence is that he was paid fortnightly. Mrs Spencer's evidence is that the pay was not fortnightly but rather depended on when the boat came in. Sometimes, three pays might be made in one month. I note from the payslips (exhibit 10) and from the descriptions set out in Mrs Spencer's written statement where the payslips are listed to explain the deductions, that the payslips are identified by trip number and unload date. On balance, I am not persuaded that it was a term of the arrangement that Mr Mangan would be paid fortnightly according to a calendar. Rather, I find that he was paid when the boat came in. Whether or not that occurred fortnightly was due to the timetable of the fishing trip. It seems accurate to say that it was approximately every fortnight.
- 11 On three occasions on 1, 8 and 15 January 1999 the respondent paid Mr Mangan the sums of \$250 on each occasion (exhibit 5). No tax was deducted. These payments were made for "travel from Broome to Perth", "overhaul on Centrefold" and "overhaul on Centrefold" respectively. From the evidence I find that these payments were made when the boat was in dock in Fremantle for overhaul and no fishing was done. I find as a fact that these payments are not encompassed within the terms of the Share Fishing Agreement. In the evidence of Mrs Spencer, the boat was originally due to be out of the water for two months but it became four months and the respondent felt it was an extended period and Mr Mangan would have no income during that period. The payment was made for that reason. I also find as a matter of fact that that was the only occasion when the boat was in dock that those three payments were made. There were other occasions when the boat was in dock but those payments were not made.
- 12 During the period of his engagement with the respondent, Mr Mangan took one period of what he described as leave. This was taken during a time when the boat was not fishing. The leave was not paid leave and Mr Mangan did not ask to be paid for that leave. I also find as a fact that if Mr Mangan was ill he did not receive, and did not request to receive, payment by way of sick leave. Further, Mr Mangan did not receive any payment for public holidays and neither did he ever request to be paid for public holidays.
- 13 The skipper of the boat, Mr Spencer, determined when the boat went to sea, where it fished and the duration of the trip. Mr Mangan had a number of set duties which were routine. Mr Spencer did not actually exercise any control over the manner in which Mr Mangan performed these duties. However, I find as a fact that Mr Spencer had the authority to issue instructions to Mr Mangan and Mr Mangan would follow those instructions. The fact that there were not many instructions, or that Mr Spencer did not "stand over his shoulder and direct Mr Mangan" does not alter the fact that Mr Spencer had the right to control Mr Mangan in the manner in which Mr Mangan performed his work. Put simply, Mr Spencer ran the boat.
- 14 In addition in approximately August 2002 the respondent unilaterally changed the percentage in the Share Fishing Agreement to 11.75% and then 10%. These changes are controversial and relevant directly to Mr Mangan's claim that he has not been paid benefits to which he is entitled under his contract of employment. It is relevant at this stage to note the changes made. They are an example of the respondent controlling, or attempting to control, Mr Mangan's remuneration.
- 15 Mr Mangan usually provided his own labour. In other words, Mr Mangan worked himself and did not have another person perform his duties for him on a regular basis. I also find, however, that on occasions when Mr Mangan was not available for work, both Mr Mangan and Mr Spencer on different occasions found a replacement and on at least one occasion Mr Mangan was told to find his own replacement and he did so. There is evidence that Broome is a small fishing port and that both Mr Mangan and Mr Spencer were likely between them to know whether other fishermen are available at short notice to work in place of Mr Mangan.

- 16 I find as a fact that during the period of engagement with the respondent, Mr Mangan did not work for any other person. Other than in the context of the respondent's objection to his claim to be an employee, it is not suggested that Mr Mangan was otherwise running his own business.
- 17 The respondent supplied at least a knife, a probe and the traps used by Mr Mangan. When Mr Mangan lost a knife over the side he would be charged for its replacement.
- 18 Mr Mangan supplied, or was responsible for supplying, his own work clothing and wet weather gear. The respondent provided him with gloves and charged him for them; Mr Mangan was therefore responsible for providing his own gloves.
- 19 The business run by the respondent consisted only of the fishing boat Centrefold and the crew of that boat consisted of Mr Spencer and Mr Mangan.
- 20 On one occasion early in the relationship, and apparently at the request of Mr Mangan for financial reasons, the respondent gave him a letter "To Whom it May Concern" stating that:
- "Brian Thomas Mangan commenced work as a share fisherman with our Company on 24 September 1998 and continues to be employed by us." (Exhibit 6)
- 21 In November 1999 Mr Mangan was given a document prepared by the respondent headed "Cyclone Contingency Plan" (part of Exhibit 7). The plan states in part that nothing in it overrides the authority of a master or interferes with his independent discretion. Under the heading "Crew Responsibilities" it states that the crew shall "follow instructions given by the skipper or the second in charge on any action to take in the event of a cyclone".
- 22 The final page of this document is headed "To All Crew members" and concerns alcoholism and drug dependency. It commences:
- "Employees can experience a wide range of problems which may adversely affect their work performance. This policy is directed at two of the (sic) these problems - alcoholism and drug dependency."
- 23 Mr Mangan places emphasis upon the use of the word "employees" on this page. (The Commission also notes that as part of the disciplinary procedures set out, a second offence will warrant dismissal. The power to dismiss is suggestive of an employment relationship.)
- 24 The respondent did not provide workers' compensation coverage for Mr Mangan. Mr Mangan was ultimately responsible for paying for his own personal accident insurance. This insurance was arranged by the respondent (exhibit 4) and the premium was deducted from payments otherwise due to Mr Mangan (for example exhibit 10). I also find as a fact that on an occasion when Mr Mangan cut his hand sufficiently to warrant medical attention, he did not claim workers' compensation, although he did have given to him by the relevant medical practitioner a "Workers' Compensation First Medical Certificate" (exhibit 2).
- 25 On 5 November 2002 Mr Mangan handed Mrs Spencer an Employment Separation Certificate for her to sign (exhibit 8). There is an issue between Mr Mangan and Mrs Spencer whether Mr Mangan had completed part of the form when he gave it to Mrs Spencer to sign or whether, as Mrs Spencer maintains, it was blank. It is not necessary at this point to resolve that issue. It is sufficient to note that on behalf of Fentosa Pty Ltd, Mrs Spencer completed, signed and sealed the "Employer Details" portion on behalf of the respondent. The significance is that in doing so Fentosa Pty Ltd is stating that it was Mr Mangan's "employer".
- 26 The circumstances of the ending of Mr Mangan's working relationship are as follows. Mr Mangan states that he asked Mr Spencer approximately six months prior to leaving if he could have some time off work to sit for his skipper's ticket in Fremantle. Mr Mangan asked when would be a convenient time for the respondent. He states that Mr Spencer replied that "it would be in six months' time". He states that approximately six months later he informed Mr Spencer approximately two weeks before he was due to leave "so that they could find a suitable replacement". He states that Mr Spencer said that after four years he would keep Mr Mangan's position open for him.
- 27 Mr Spencer's evidence is that Mr Mangan told him he was going for his skipper's ticket and Mr Spencer replied 'Righto'. Mr Spencer heard nothing further for approximately six months and thought Mr Mangan was no longer going to do so. Then, three days into the last trip, Mr Mangan merely told him he was going for his ticket on Friday. Mr Spencer replied "Where does that leave me?" and Mr Mangan replied "you'll have to get someone else, I can get a job anywhere". Mr Spencer denies that he said he would keep Mr Mangan's position open for him.
- 28 It is sufficient at this stage to note that Mr Mangan last worked on the boat on 20 August 2002. He then left to go to Fremantle some three or four days later. Mr Mangan's evidence is that the skippers' course lasted 8 weeks starting in September 2002. He did go home for a short period after the course and did not return to Broome until approximately 5 November 2002.
- 29 I find as a matter of fact that after Mr Mangan departed, another person was engaged by the respondent who ultimately informed Mr Spencer that he wanted a chance of buying the boat.
- 30 I now turn to consider the law in the matter. Mr Mangan is required to prove on the balance of probabilities that he was an employee for the purposes of the *Industrial Relations Act 1979*. The definition of "employee" in the Act, somewhat unhelpfully, refers to "any person employed by an employer to do work for hire or reward". It includes any person whose usual status is that of an employee. Therefore, Mr Mangan has to prove that he is an employee by showing that he was "employed by an employer". The determination whether he was will therefore depend upon the Commission applying the above facts to a number of criteria which have been established by the many previous cases where the status of a person as an employee is in question.
- 31 Therefore, the fact that Mr Mangan signed a series of Shared Fishing Agreements does not determine the issue by itself. The fact that Mr Mangan and the respondent signed a series of Share Fishing Agreements is one factor. The Share Fishing Agreements do not refer to Mr Mangan being an employee. In fact, as becomes clear later in these Reasons, several of the terms of the Shared Fishing Agreements strongly suggest that Mr Mangan was not an employee but rather a share fisherman. If, in truth, Mr Mangan is an employee then the parties signing a document labelling him a share fisherman will not mean that he was not an employee. However, if, on a consideration of the relevant criteria to the facts of this matter, it is not clear whether Mr Mangan was an employee, then the fact that he has signed an agreement making him a share fisherman will be accepted as properly describing his status.
- 32 Mr Mangan referred in his submissions to a decision of Smith C in *Greig v. Kraus Fishing Company Pty Ltd* (2001) 81 WAIG 3128 where she held that a fisherman who signed a Share Fishing Agreement was, on a consideration of all of the facts in that matter, an employee of the respondent. Under the heading of "relevant matters" Smith C held that the respondent expressly retained the right to terminate the applicant's engagement if he refused to comply with "any reasonable instructions or directions given by the respondent ..."; whilst engaged the applicant was required to make himself available to work each trip

but could, if the skipper agreed, arrange short term relief; the applicant was paid for each trip to sea and tax was deducted at the rate of 20% on the basis that he was carrying on his own enterprise. The applicant was not entitled to be paid annual leave, sick leave, long service leave or superannuation. The Share Fishing Agreement signed by the parties to that matter provided that nothing in the agreement created the relationship of employer and employee between those parties. The applicant was required to provide or pay for wet weather clothing and protective clothing and provide his own bedding and other personal items. The respondent arranged for the applicant to keep a current fisherman's licence, the cost of which was deducted from trip proceeds paid to the applicant. The applicant was required to hold personal accident insurance of a type and amount specified by the respondent. The applicant essentially provided his manual labour exclusively to the respondent from time to time. At the end of each engagement, the applicant retained nothing of value from the venture. He did not build any asset or goodwill and had no right to determine or negotiate the sale of any seafood caught by his efforts. The Commissioner found that the applicant did not carry on a business for himself but did so for the respondent.

- 33 The Commissioner also at paragraphs 26 and 27 referred to other cases where a Share Fishing Agreement had been signed by skippers who have been found to be independent contractors and not employees. She noted cases where a contrary conclusion was reached where a skipper who entered into a Share Fishing Agreement was seen to be an employee of the owner of the vessel and where a deckhand who had entered into a Share Fishing Agreement was an employee of the owner of the vessel.
- 34 From Smith C's own decision, and the cases to which she was referred and to which she has referred, it can safely be said that the mere fact that parties have signed a Share Fishing Agreement of itself does not answer the question whether a skipper or a fisherman is in law an employee. Rather, it will depend on a consideration of all of the facts of each particular case. The facts in one case may lead to the conclusion that an applicant is an employee whilst the facts in a similar but different case may lead to the contrary conclusion.
- 35 In his submission that he was the respondent's employee, Mr Mangan placed emphasis upon the right Mr Spencer had to control his work. He is correct to do so because the right of an employer to control the work of a person can be the most important of the criteria distinguishing an employee from a contractor. It is important to bear in mind however that it is the whole of the relationship which is to be considered.
- 36 In the context of differentiating between an employee and a contractor, the majority of the Industrial Appeal Court in *United Construction Pty Ltd v. Birighitti* (2003) 83 WAIG 434 at [13] stated:

"Therefore, it is a case in which there was an express agreement between the parties pursuant to which it was intended that the appellant was no longer to be an employee but instead was to be an independent contractor. If that was the beginning and end of the arrangement it would be a most important if not decisive consideration in deciding whether the relationship of employer and employee had ceased and the relationship of principal and independent contractor had commenced: *Massey v Crown Life Insurance Co* [1978] 2 All ER 576 per Lord Denning MR at 580. But there was obviously more to it than that, as the Industrial Magistrate and the Full Bench found. The fact is that the respondent continued to enjoy benefits that were inconsistent with a simple sub-contract relationship. It is well settled that the true relationship of the parties is to be gathered from the effect of the arrangement as a whole and not just from a single term of the arrangement which seeks to put a label on that relationship. *Massey v Crown Life Insurance Co* (supra) per Lord Denning MR at 579; *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 at 601, 606. Whilst the parties may have genuinely expressed an intention in one part of their contract to enter into a relationship of principal and independent contractor and may have genuinely desired to do so the question remains whether in point of law they succeeded in doing so. That involves a consideration of all of the terms of the arrangement not just the declaration by the parties that their relationship is one thing or the other. It is the effect of the arrangement as a whole which is decisive and if the effect of the arrangement as a whole is to create (or in this case maintain) the relationship of employer and employee then a statement that the relationship is to be that of principal of independent contractor is of no effect: *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (supra) at 606."

- 37 An employment relationship is distinguishable from, for example, the relationship of principal and independent contractor, from principal and agent and from a partnership by considering the whole of the relationship.
- 38 I now consider the relevant criteria:

#### Control

- 39 The right of Mr Spencer to control the work of Mr Mangan is a strong factor in favour of finding that Mr Mangan was an employee of the respondent. In the circumstances of a crew member on a boat this has to be balanced with the right of a skipper to direct the crew of a boat according to a regular chain of command. The fact that a skipper can tell a member of the crew when the boat is put into sea, where it is going and the duration of the trip is also consistent with the right of a skipper to control the boat, and not of a crew member.
- 40 There remains the evidence that Mr Spencer was able to direct Mr Mangan in his day-to-day duties which is consistent with Mr Mangan being an employee. As Mr Spencer said, if Mr Mangan wanted to throw a trap over the side a certain way, as long as it wasn't dangerous, Mr Spencer wouldn't have worried, as long as it went over when he yelled out to put it over.
- 41 There is no clear evidence before the Commission whether Mr Spencer had the right to dismiss Mr Mangan. However, I infer that he did from the statement to that effect in the drug and alcohol policy document distributed to Mr Mangan and to which I have already referred. That is consistent with the right of an employer to control the work of an employee. Indeed, the right to dismiss is the ultimate right of control of an employer over an employee. There is also the unilateral variation of his percentage remuneration by the respondent.

#### Supply of own Labour

Mr Mangan essentially provided his manual labour exclusively to the respondent from time to time. However he did find a replacement on one occasion when asked to do so.

- 42 There is no evidence to allow a conclusion that Mr Mangan was in business for himself in that he was conducting a business independently of his work as a fisherman on the respondent's vessel. He did not build any asset or goodwill. He did not have the right to sell any seafood caught by his efforts. (However, it is not, as I understand it, suggested that Mr Mangan was in business for himself. It is suggested that he was a share fisherman.)

#### Supply of Tools or Equipment

- 43 The fact that the respondent supplied a knife, or knives, is consistent with an employer providing the tools necessary for the employee to work. That is certainly the case in relation to the distinction between an employee and a contractor.

### Documents

- 44 The documents prepared by the respondent and which refer to Mr Mangan as either being “employed”, or which were directed to “employees”, and the signing of the Separation Certificate are necessarily indications in favour of Mr Mangan being an employee. I do not regard the “To Whom it may Concern” and the Separation Certificate documents as particularly significant however. They appear to have been written and signed respectively more to assist Mr Mangan for his own financial purposes than they were to declare him to be an employee as such.
- 45 I consider the above criteria point to Mr Mangan being an employee. In contrast however I find the following criteria point to Mr Mangan not being an employee.

### The agreement of the parties

- 46 On four occasions Mr Mangan signed a Share Fishing Agreement. It is not in its terms a contract of employment. It does not describe the parties as employer or employee respectively. Moreover, as set out below, the Agreements imposed obligations on Mr Mangan inconsistent with his being an employee.

### Whether part of respondent’s business

- 47 By virtue of the Share Fishing Agreements, Mr Mangan contributed to the costs of the venture as well as receiving a percentage of the sale of the fish. He ran a risk of loss (even if, on the evidence, the risk is not great) as well as a risk of profit by virtue of the Share Fishing Agreement which obliged him to contribute 12.75% of the operating expenses of the vessel. Those operating expenses include the cost of regularly maintaining the vessel in good and seaworthy order and condition; the cost of fuel, oil and bait; repair of fishing equipment and general provisions for the sustenance of the crew of the vessel. That obligation is quite inconsistent with Mr Mangan being an employee. The applicant in *Greig v Kraus Fishing Company Pty Ltd* (Smith C’s decision referred to earlier in these Reasons) did not have that obligation. Neither did the applicant in *Davy v Cray Holdings Pty Ltd* (Industrial Relations Court of Australia No. 127/96, Ritter JR, unreported) to which Smith C referred in her decision. That is a critical difference. The payment of business expenses by Mr Mangan from his remuneration is a positive indication that he was not an employee. An employee works for hire or reward and does not contribute to the employer’s costs of employing him.
- 48 Further, an employee is entitled to be paid a given wage on a regular basis whether or not the employer has made a profit or a loss in any given period. Mr Mangan did not merely receive a wage based upon a percentage of the fish sold. Here, if the operating expenses exceeded the return on the fish sold, Mr Mangan’s share was correspondingly affected. I do not conclude that Mr Mangan was part of the respondent’s business as an employee is part of an employer’s business. Rather, he had a share in each venture.

### Mr Mangan’s own arrangements

- 49 During the period of the currency of the Share Fishing Agreements it cannot be said that Mr Mangan regarded himself as an employee given that:
- 50 (1) He did not have tax deducted in the manner that an employee has PAYG tax deducted from a wage or salary by an employer. It may well be as Mr Mangan submitted, that how a person arranges his tax is an administrative issue. That is likely to be so if all the criteria except tax point to the person being an employee. Failure to pay the correct tax will not convert a person who is otherwise an employee to a person who is not an employee. It just leads to the conclusion that the employee has not paid the applicable, and higher, tax of an employee and the taxation authorities may require the difference to now be paid. Nevertheless, Mr Mangan’s taxation arrangements are a relevant consideration and point to him not being an employee. In this context those arrangements are more than “an administrative issue”.
- 51 (2) Mr Mangan took out and used an Australian Business Number for taxation purposes when the new tax system came into effect. An employee is not required to have an ABN.
- 52 (3) The rate at which Mr Mangan paid his own taxation, 20%, is not an employee rate of tax.
- 53 (4) Mr Mangan recognised that he was not entitled to paid annual leave, sick leave or public holidays by not asking for such payment when he injured himself or took leave.
- 54 (5) Mr Mangan paid for his own personal accident insurance.
- 55 (6) Mr Mangan did not claim workers’ compensation when he injured his hand.

### Superannuation

- 56 There is no evidence that any superannuation payment was made on Mr Mangan’s behalf as an employer is obliged to make on behalf of an employee.

### Regularity of Payment

- 57 Mr Mangan did not receive regular fortnightly payments but rather payments made on the basis of when the boat came in (I do not necessarily regard this as a strong factor given that the Share Fishing Agreement in any event linked Mr Mangan’s remuneration with the sale of fish rather than to calendar time).

### Other Matters

- 58 The three payments of \$250 to Mr Mangan on one occasion only in January 1999, when the boat was in dock in Fremantle for overhaul and no fishing was done, is a neutral factor. Had such payments been made for the complete duration of the boat’s time in dock, and on each occasion the boat was in dock, then a different conclusion would be open. The one-off payments are certainly not payments to which Mr Mangan was entitled under the Share Fishing Agreement. However that does not on its own lead to the conclusion that he must therefore have been an employee for the duration of the relationship. If anything it suggests a different arrangement when the boat came out of the water. In any event it is difficult to see the payments as a wage paid to an employee by an employer when, as with other payments made to him, tax was not deducted from the payments.

### Conclusion

- 59 It is “the effect of the arrangement as a whole” (as quoted in the Industrial Appeal Court decision at paragraph 36 above) which is decisive. The strength of criteria pointing to Mr Mangan being an employee is more than balanced by the evidence that during the currency of the Share Fishing Agreements Mr Mangan both contributed to the costs of the fishing venture and received a corresponding share of the sale of fish and that he did not conduct his own affairs as an employee of the respondent. Indeed, the evidence is that the first time he regarded himself as an employee was when he asked Mrs Spencer to sign the

Employment Separation Certificate to enable him to receive a benefit. The effect of the arrangement as a whole did not create the relationship of employer and employee.

60 In such a circumstance, the Share Fishing Agreement entered into by the parties takes on a stronger relevance. The Share Fishing Agreement does not identify Mr Mangan as an employee but rather as a share fisherman entitled to a percentage of the profits, or to contribute a share of any loss, of each venture. Accordingly, Mr Mangan was not an employee.

61 It follows that he is not able to refer to the Commission the claims that he was unfairly dismissed by Helenika Fisheries and also that he has not been paid benefits to which he is entitled under his contract of employment. An order now issues which dismisses his claim for want of jurisdiction.

**2004 WAIRC 11063**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	BRIAN MANGAN	<b>APPLICANT</b>
	-v-	
	HELENIKA FISHERIES	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	TUESDAY, 6 APRIL 2004	
<b>FILE NO</b>	APPLICATION 1872 OF 2002	
<b>CITATION NO.</b>	2004 WAIRC 11063	

<b>Result</b>	Application alleging unfair dismissal and denied contractual benefits dismissed for want of jurisdiction
<b>Representation</b>	
<b>Applicant</b>	Mr B. Mangan
<b>Respondent</b>	Mrs H. Spencer and Mr B. Spencer

*Order*

HAVING HEARD Mr B. Mangan on his own behalf as the applicant and Mrs H. Spencer and Mr B. Spencer on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders -

THAT the application be dismissed for want of jurisdiction.

[L.S.]

(Sgd.) A R BEECH,  
Senior Commissioner.

**2004 WAIRC 11013**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	REX J MINTROM	<b>APPLICANT</b>
	-v-	
	STONDON PTY LTD T/AS AVON WASTE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE</b>	THURSDAY, 1 APRIL 2004	
<b>FILE NO</b>	APPLICATION 1338 OF 2003	
<b>CITATION NO.</b>		

<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Whether dismissal or resignation – Intent of parties considered – No dismissal at the initiative of the employer – Commission lacks jurisdiction – Application dismissed – Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
<b>Result</b>	Application alleging unfair dismissal dismissed.
<b>Representation</b>	
<b>Applicant</b>	Mr R Mintrom
<b>Respondent</b>	Mr G Fisher and with him Ms C Fisher

*Reasons for Decision*

- 1 This is an application by Rex Julian Mintrom (the “applicant”) pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* (the “Act”). The applicant alleges that he was unfairly terminated from his employment with Stondon Pty Ltd trading as Avon Waste (the “respondent”) on 4 August 2003. The respondent maintains that the applicant was not terminated and argues that the applicant resigned from his employment with the respondent.

### Background

- 2 The applicant commenced employment with the respondent in August 2000 at the respondent's Northam landfill site, undertaking clerical duties. He was employed continuously on a permanent part-time basis working Friday, Saturday, Sunday and Monday of each week from 8:00am to 5:00pm. The applicant was employed for approximately 36 hours per week, he was entitled to annual leave and sick leave and he was paid \$12 per hour. The respondent had no issues with the applicant's performance or behaviour throughout his employment.

### Applicant's evidence

- 3 On or about 10 July 2003 the applicant became employed on a part-time basis with the Albany and District Skills Training Committee Incorporated ("the Committee"). His job was to assist in the administration and management of various projects the Committee was undertaking locally for the Work for the Dole scheme (Exhibit A1). The applicant was to work two days per week for a period of approximately 90 days and although there was no guarantee of ongoing employment subsequent to this period, there was the possibility of full-time employment eventuating with the Committee for the applicant.
- 4 Approximately two days after the applicant commenced work with the Committee he was asked to work on a Friday. On or about 7 July 2003 the applicant contacted one of the respondent's directors Ms Carol Fisher and requested permission not to work for the respondent on Fridays over the next two or three weeks. In order to assist the respondent, the applicant suggested the name of another employee who could fill in for him. Ms Fisher responded by saying that the respondent would take care of the situation. During this conversation the applicant mentioned to Ms Fisher that he had obtained another part-time position.
- 5 Approximately one week after the applicant commenced work with the Committee the applicant's supervisor at the Committee, Mr Cox, died unexpectedly. As this created extra work pressures the Committee asked the applicant to work Fridays on an ongoing basis. The applicant then contacted the respondent and spoke to Mr Graeme Fisher, the other director of the respondent, about continuing to have Fridays off for a further period. During this discussion the applicant offered to give up working Fridays on a permanent basis as he thought this ongoing leave of absence could be inconvenient to the respondent. The applicant also told Mr Fisher that if his new position with the Committee became full-time he would give adequate notice to the respondent of his intention to resign.
- 6 The applicant stated that approximately two weeks after this discussion he visited the Northam landfill site and was told by another employee that he had been replaced and that other employees were now working the days he normally worked. After this discussion the applicant telephoned the respondent and informed Ms Fisher that he had not resigned. In response the applicant was told that other employees had been allocated his normal days and that there was no further work available for him to undertake with the respondent. However, the respondent allowed the applicant to work his normal days for that week. The applicant confirmed that he last worked for the respondent on 4 August 2003.
- 7 Approximately one week after the applicant ceased employment with the respondent, Mr Fisher visited the applicant at his new workplace. The applicant told Mr Fisher that he had not resigned and he wanted his job back. Mr Fisher reiterated that the applicant had been replaced. The applicant then requested a separation certificate and a final payslip from the respondent.
- 8 After Mr Cox died the applicant worked four days per week for the Committee and he ceased employment with the Committee at the end of August 2003. The applicant then applied for a number of positions in Northam and Perth and at a number of mine sites as well as signing up with Centrelink. Just prior to Christmas 2003 the applicant obtained employment working 45 hours per week, taking home approximately \$500 nett per week in wages. The applicant is not seeking reinstatement as he has since obtained alternative employment.
- 9 Under cross-examination the applicant denied that he resigned on 7 July 2003 when he spoke to Ms Fisher. It was put to the applicant that he had taken a number of days off in the past and this had not been an issue for the respondent and that the respondent had not dismissed him as a result of these absences. The applicant agreed that that was the case.
- 10 The applicant was asked why he told the respondent that he had obtained another part-time job if this position did not impact on his employment with the respondent. The applicant stated that he informed the respondent of his new position out of courtesy to the respondent. The applicant maintained that he would not have resigned his position with the respondent as his employment with the Committee was on a casual basis and was only guaranteed for three months. The applicant confirmed that during July 2003 he had discussions with a number of colleagues and a friend about his position with the respondent possibly becoming vacant. He stated that he had these discussions in the context of the possibility of him gaining a full-time position with the Committee after three months of part-time employment.
- 11 Mr Michael O'Donahue confirmed that he had a discussion with the applicant in early July 2003 about the applicant possibly leaving his position with the respondent. As Mr O'Donahue was looking for work at this time he sent his résumé to the respondent in early July 2003. He recalled discussions with the applicant whereby the applicant told him that it was possible he was going to resign from his employment with the respondent. He also stated that at the same time he understood the issue of the applicant's ongoing employment with the respondent was still up in the air as the applicant was undecided about his intentions.
- 12 Under cross-examination Mr O'Donahue confirmed that the applicant told him that a four day a week position may be available with the respondent in the future. He also stated that he was aware that this position becoming available was dependent on alternative work being guaranteed for the applicant.
- 13 2004 WAIRC 11013 Mr Lionel Page currently works with the respondent. Mr Page understood that the applicant rang Ms Fisher on or about 11 July 2003 to arrange to have some Fridays off. The applicant told him that he may be giving notice to the respondent and that he had told Ms Fisher that Mr Page may be available to undertake his shifts. Mr Page could not recall if a specific date was discussed about when the applicant was to cease employment with the respondent. Eventually Mr Page was offered employment on a Friday with the respondent in addition to his existing employment on a Saturday.
- 14 Under cross-examination Mr Page confirmed that in mid July 2003 the applicant contacted him and informed him that additional days may soon be available for him to undertake and as a result Mr Page rang Ms Fisher to see whether or not he could work additional days if and when the applicant ceased employment with the respondent. He was unsure at the time whether or not the applicant was staying or leaving. He stated that the applicant gave him the impression that as a result of Mr Cox's death, he thought he may take over Mr Cox's former position.

### Respondent's evidence

- 15 Mr Fisher confirmed that during the applicant's employment with the respondent he had a number of absences, as confirmed by an extract of the respondent's time and wage records (Exhibit R1A). Mr Fisher stated that these absences did not affect the applicant's ongoing employment with the respondent.

- 16 Mr Fisher gave evidence that the respondent retained a message book which recorded dates of phone calls relating to the respondent's operations. Extracts from this diary confirm the dates of a number of telephone conversations involving the applicant throughout July 2003 (Exhibit R2). Mr Fisher stated that the respondent's diary records confirm that on 7 July 2003 the applicant phoned Ms Fisher. After Ms Fisher's discussions with the applicant on this date Ms Fisher told Mr Fisher that the applicant had resigned and there was no urgency to replace him at that stage as the applicant would be continuing to work with the respondent over the next three to four weeks.
- 17 Mr Fisher stated that when the applicant again contacted the respondent on 11 July 2003 and asked for the next two Fridays off this request was granted. During another telephone conversation with Mr Fisher on 15 July 2003 the applicant informed him that Mr Page may be interested in working some of the applicant's days.
- 18 Mr Fisher confirmed that on 16 July 2003 Mr O'Donahue contacted the respondent seeking employment and then sent his résumé to the respondent. Mr Fisher stated that a number of other existing employees contacted him at this time wanting to take on the days that the applicant normally worked. Given these events Mr Fisher understood that this was confirmation that the applicant had resigned.
- 19 As the applicant had given notice of his intention to resign on 7 July 2003, effective in three to four weeks time, the respondent employed a new employee to cover two days of the applicant's shift and two existing employees were given an extra day each. When the applicant became aware that his normal days had been allocated to other employees he telephoned Mr Fisher and told Mr Fisher that he had not ceased work with the respondent. Mr Fisher responded by informing the applicant that his resignation had already been accepted, however he was allowed to finish his normal shift for that week and the following week the applicant was paid outstanding entitlements due to him. Mr Fisher later visited the applicant at his new workplace to thank him for his services and the applicant again mentioned that he wanted his job back. Mr Fisher told him that others were now working his days and the job was no longer available.
- 20 Mr Fisher stated that he had no personal issues with the applicant or with the applicant's ability to undertake his job. There was therefore no reason for the respondent to replace the applicant in July 2003. Further, there was no financial gain to the respondent in terminating the applicant. The respondent was operating on the honest belief that the applicant had tendered his resignation to take up a better job which was more suited to his skills.
- 21 Mr Lloyd Westbrook was the applicant's supervisor at the Northam landfill site and he had daily contact with the applicant. In mid July 2003 the applicant told Mr Westbrook that he would be leaving the respondent as he had been offered full-time employment elsewhere. At that point Mr Westbrook was under the impression that the applicant was definitely ceasing his employment with the respondent.
- 22 Mr Rex Warne has worked with the respondent for approximately three years undertaking the same work as the applicant. When Mr Warne returned from leave in mid July 2003 he was informed by Mr Westbrook that the applicant had resigned and would be leaving the respondent. On a couple of occasions the applicant came to work and told Mr Warne that he would be leaving the respondent as he had a new position with the Committee. Mr Warne stated that he contacted Ms Fisher seeking to take on some of the applicant's hours because the applicant had a new job.
- 23 Ms Fisher stated that during her telephone conversation with the applicant on 7 July 2003 she understood the applicant had handed in his resignation as the applicant told her that he would be leaving the respondent in three to four weeks' time. Ms Fisher immediately told Mr Fisher of this discussion. Ms Fisher confirmed that the respondent had no problem with giving the applicant the Fridays off that he requested and that she had a good working relationship with the applicant. Ms Fisher stated that Mr O'Donahue contacted her about a week later asking to work the applicant's days.

#### Submissions

- 24 The applicant maintains that he had no recollection of resigning during his discussions with the respondent in July 2003. The only mention of a resignation was when he told the respondent that there was the possibility of him resigning at some stage in the future.
- 25 The respondent maintains that the applicant was not terminated. The respondent had an honest belief that the applicant resigned on 7 July 2003 and there were no indications given by the applicant to the contrary throughout July 2003. Further, the respondent had no motive for terminating the applicant. It is on this basis that the respondent maintains that the applicant resigned.

#### Findings and conclusions

##### Was the applicant terminated?

- 26 In relation to an unfair dismissal claim brought pursuant to s29(1)(b)(i) of the Act, it is incumbent upon an applicant, on the balance of probabilities, to demonstrate that he or she has been dismissed by the employer to attract the Commission's jurisdiction.
- 27 In *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200 at 205, the Full Court of the Industrial Relations Court of Australia said:

“termination at the initiative of the employer” involves a “termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship”.

“[A]n important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have been remained in the employment relationship”. See Macken, McCarry and Sappideen's Law of Employment 4<sup>th</sup> Edition page 227-228.”

In *Chris Toncich v People Who Care Incorporated* (2003) 84 WAIG 401 at p403, Kenner C said:

“The question of a resignation, truly voluntary, or a dismissal, is a jurisdictional fact necessary to be found by the Commission in order to ground jurisdiction in matters of this kind. It is well settled that to attract the Commission's jurisdiction in claims of this kind, an employee must be “dismissed”: *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) 83 WAIG 353 (IAC); (2003) 83 WAIG 919 (FB). It is also the case, that in circumstances of a “resignation”, apparently tendered by an employee, those circumstances may be a dismissal for the purposes of the Act, if the contract of employment is not terminated truly voluntarily by the employee: *Attorney - General v WA Prison Officers Union* (1995) 75 WAIG 3156. Furthermore, an employee may be “constructively dismissed”, in the event that the employer conducts itself by way of a breach of the contract of employment, going to its root, so as to justify its acceptance by the employee: *Western Excavating (EEC) Ltd v Sharp* [1978] QB 761 per Denning MR at 769.”

- 28 It was not in contest and I find that the applicant commenced employment with the respondent in August 2000 working four days per week, he ceased employment with the respondent on 4 August 2003 and that the respondent had no issues with the applicant's performance or behaviour, even though the applicant had a number of absences throughout his employment.
- 29 I listened carefully to the evidence given by each witness. In my view, each witness gave their evidence honestly and to the best of their recollection. The issue in dispute in this matter centres around whether or not the applicant tendered his resignation to Ms Fisher during his telephone conversation with Ms Fisher on 7 July 2003. Given the weight of evidence against the applicant's claim that he did not resign in July 2003 I prefer the evidence of Ms Fisher to that of the applicant on this issue. Even though the applicant cannot recall resigning on 7 July 2003 during his discussion with Ms Fisher I find that on the balance of probabilities the applicant did indicate his intention to resign to Ms Fisher during this conversation. Ms Fisher's recollection of her conversation with the applicant on 7 July 2003 was corroborated by Mr Fisher's evidence and this view is consistent with the evidence given about the applicant's discussions with a number of colleagues and friends in July about his position with the respondent becoming available in the near future. These conversations took place in the context of the applicant taking up a part-time position with the Committee with the prospect of this position becoming full-time. However, in the event this full-time position did not eventuate. In concluding that in all probability the applicant resigned during his conversation with Ms Fisher on 7 July 2003 I take into account that the respondent had no reason to terminate the applicant at this time. There was no financial gain to the respondent terminating the applicant and the evidence was clear that the applicant had a good relationship with the respondent throughout his three years of employment. I also accept the respondent's evidence that the applicant had taken a number of days off in the past and that this had not caused concern to the respondent nor had the respondent moved to replace or terminate the applicant during these periods. As the respondent was happy with the applicant's employment record and his performance the respondent had no reason to terminate the applicant. The applicant appears to have been operating on the basis that his new part-time position with the Committee would become a full-time position and that he was virtually guaranteed this position. This is supported by the applicant working more days per week with the Committee subsequent to Mr Cox's death. I formed the impression that the applicant had every expectation that his position with the Committee would evolve into a full-time position and it may well have been the case that the applicant was operating on this basis when he informed the respondent about his new position on 7 July 2003. I therefore accept Ms Fisher's evidence that she understood that the applicant had resigned during the telephone conversation on 7 July 2003.
- 30 I conclude that the applicant gave notice of his resignation to the respondent on 7 July 2003 and the respondent accepted his resignation on that date. I therefore find that the applicant resigned of his own accord and that his resignation was not due to any action on the part of the respondent.
- 31 As I have found that the applicant was not terminated there is therefore no jurisdiction for the Commission to deal with this application.
- 32 An Order dismissing the application will now issue.

**2004 WAIRC 11012**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	REX J MINTROM	<b>APPLICANT</b>
	-v-	
	STONDON PTY LTD T/AS AVON WASTE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE OF ORDER</b>	THURSDAY, 1 APRIL 2004	
<b>FILE NO/S</b>	APPLICATION 1338 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 11012	

**Result** Application alleging unfair dismissal dismissed.

*Order*

HAVING HEARD Mr R Mintrom on his own behalf and Mr G Fisher on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,  
Commissioner.

**2004 WAIRC 10887**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	CAROL PENN	<b>APPLICANT</b>
	-v-	
	PATRICIA EDWARD; VERSCHUER EDWARD, BARRISTERS & SOLICITORS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	MONDAY, 8 MARCH 2004	
<b>FILE NO/S</b>	APPLICATION 1194 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10887	

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<b>Catchwords</b>	Industrial law (WA) - Termination of employment – Alleged contractual entitlements – Application for costs brought by respondent upon notice of discontinuance being filed by the applicant – Costs by way of disbursements ordered – <i>Industrial Relations Act 1979</i> (WA) s 27(1)(c).
<b>Result</b>	Order issued.
<b>Representation</b>	
<b>Applicant</b>	Mr D Clarke as agent
<b>Respondent</b>	Ms P Edward of counsel

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*Reasons for Decision  
(Ex Tempore)*

- 1 The applicant, by notice in these proceedings, seeks leave to discontinue the substantive application. It is common ground that the application to discontinue the proceedings was filed on 4 March 2004, with the substantive application due to be heard by the Commission today, on 8 March 2004.
- 2 In response, the respondent brings an application for costs, on the basis that it submits that the applicant's claim is, in effect, frivolous and vexatious and had no reasonable prospect of success.
- 3 Having considered the matter, in particular in light of the prior conduct of the applicant in failing to comply with directions of the Commission for at least a period of some three months plus, the lateness of the applicant in seeking leave to discontinue the application, and also in light of the fact that the Commission has by order removed the applicant's witness statement from the Commission file on the grounds that it contains scandalous material, considers that in the circumstances there ought be some recompense to the respondent.
- 4 However, given the limits on the Commission's powers as to costs in s 27(1)(c) of the *Industrial Relations Act 1979* (WA), which, regrettably in the present circumstances, precludes the Commission making orders for costs and expenses for legal practitioners and paid agents, which in my opinion is a matter which ought be reviewed by the parliament in this State, costs claimed by the respondent, save for disbursements in the sum of \$48.40, are not in any event, able to be recovered.
- 5 Whilst Ms Edward is appearing as the principal of the respondent, she does so, in my opinion, as a legal practitioner, and therefore any costs in respect of her time as a practitioner, albeit as the principal of the respondent, are not amenable to an order for costs in this jurisdiction, which, as I say, is in the circumstances, a matter of some regret, and which ought in my opinion, as I have already said, be brought to the attention of the parliament.
- 6 Nonetheless, in the circumstances what the Commission proposes to do is order that the applicant pay to the respondent costs by way of disbursements pursuant to the schedule of respondent's costs handed to the Commission this morning, in the sum of \$48.40, within seven days.
- 7 In other respects the application be and is hereby discontinued by leave.

2003 WAIRC 09472

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	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	CAROL PENN	<b>APPLICANT</b>
	-v-	
	PATRICIA EDWARD, VERSCHUER EDWARD, BARRISTERS & SOLICITORS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	WEDNESDAY, 24 SEPTEMBER 2003	
<b>FILE NO</b>	APPLICATION 1194 OF 2003	
<b>CITATION NO.</b>	2003 WAIRC 09472	

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<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr D Clarke as agent
<b>Respondent</b>	Mrs P Edward of counsel

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*Direction*

HAVING heard Mr D Clarke as agent on behalf of the applicant and Mrs P Edward of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT any request by the respondent for particulars be filed and served by 23 September 2003.
2. THAT any request by the applicant for particulars be filed and served by 23 September 2003.
3. THAT the applicant shall respond to the respondent's request by 4 October 2003.
4. THAT the respondent shall respond to the applicant's request by 4 October 2003.

5. THAT each party shall give discovery on affidavit by 16 October 2003.
6. THAT inspection of documents shall be completed by 23 October 2003.
7. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
8. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.
9. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than seven days prior to the date of hearing.
10. THAT the applicant and respondent file an agreed statement of facts (if any) no later than seven days prior to the date of hearing.
11. THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than seven days prior to the date of hearing.
12. THAT the matter be listed for hearing for one day.
13. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2004 WAIRC 10886**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
CAROL PENN

**PARTIES**

**APPLICANT**

-v-

PATRICIA EDWARD; VERSCHUER EDWARD, BARRISTERS & SOLICITORS

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** MONDAY, 8 MARCH 2004  
**FILE NO/S** APPLICATION 1194 OF 2003  
**CITATION NO.** 2004 WAIRC 10886

**Result** Order issued  
**Representation**  
**Applicant** Mr D Clarke as agent  
**Respondent** Ms P Edward of counsel

*Order*

HAVING heard Mr D Clarke as agent on behalf of the applicant and Ms P Edward of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act"), hereby orders –

- (1) THAT the witness statement of the applicant filed 25 February 2004 be and is hereby struck out.
- (2) THAT the applicant pay to the respondent costs by way of disbursements the sum of \$48.40 within seven days of the date of this order.
- (3) THAT the herein application otherwise be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2004 WAIRC 10895**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JOANNE MARGARET STAGG

**PARTIES**

**APPLICANT**

-v-

NELL GRAY MANUFACTURING

**RESPONDENT**

**CORAM** SENIOR COMMISSIONER A R BEECH  
**DATE** TUESDAY, 16 MARCH 2004  
**FILE NO** APPLICATION 129 OF 2004  
**CITATION NO.** 2004 WAIRC 10895

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<b>Result</b>	Application out of time dismissed.
<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Application referred outside of 28 day time limit – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – Industrial Relations Act 1979 (WA) s29(1)(b)(i),(2)&(3)
<b>Representation</b>	
<b>Applicant</b>	Mr N.A. Stagg (as agent)
<b>Respondent</b>	Mr D. Johnston (as agent)

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*Reasons for Decision*

- 1 On 2 February 2004 Mrs Stagg filed a claim of unfair dismissal against Nell Gray Manufacturing. The date her employment terminated was 15 December 2003. Her claim of unfair dismissal needed to be lodged within 28 days of that date. Therefore, Mrs Stagg's claim was lodged 23 days out of time. The Commission may accept the claim if it would be unfair not to do so and accordingly it was listed in order for the Commission to give both Mrs Stagg and the respondent an opportunity to put submissions before it regarding that issue.
- 2 With the agreement of both Mrs Stagg and the respondent, the application was set down for hearing for 10:30am on 15 March 2004. On that day, Mr Stagg appeared on his wife's behalf. He had an unsigned Warrant to Appear as Agent form. Mrs Stagg was not present in court. Mr Stagg advised the Commission that Mrs Stagg was that day commencing new employment which she had found only the previous Friday. Mrs Stagg's assessment was that she should attend her new job and would be unable to have the day off to attend the hearing.
- 3 The Commission informed Mr Stagg that much of the evidence he could give on his wife's behalf would be hearsay and would be unlikely to be accepted by the Commission if there was direct evidence to the contrary from Mr Buckingham, the managing director of the respondent. Mr Stagg stated that Mrs Stagg was unlikely to be able to get time off from her new job to attend the hearing in the near future and that she intended for the matter to proceed in her absence.
- 4 The respondent objected to the absence of Mrs Stagg and submitted that the application should therefore not proceed, or be dismissed. The respondent also objected to the Commission receiving in evidence the five page written statement of Mrs Stagg attached to her Notice of Application.
- 5 The Commission decided, over the objection of the respondent, to allow Mr Stagg to present Mrs Stagg's case for the following reasons. There is no reason to disbelieve Mr Stagg that Mrs Stagg has just commenced new employment. It is reasonable that Mrs Stagg regards the new employment as sufficiently important that she was unable to attend the hearing herself without jeopardising that employment. Had the circumstances been different, and Mrs Stagg had simply elected not to attend the hearing, the Commission would have reached a different conclusion and dismissed her claim for want of prosecution.
- 6 Further, the five hand written pages attached to the Notice of Application set out in detail the basis of why the application was lodged late and the reasons why Mrs Stagg lodged the application. The Commission is not a court of law and is not bound by the rules of evidence. Nevertheless, it is up to Mrs Stagg to produce sufficient evidence to show that it would be unfair not to accept her claim. Even if the Commission regards the pages attached to the Notice of Application as constituting evidence upon which a decision could be based, the fact that Mrs Stagg is not available to be cross-examined upon what she has written must mean that the pages can be given little, if any, weight. That will be particularly so if there is a statement within those pages which conflicts with sworn evidence of Mr Buckingham. In that circumstance, it is most likely that the evidence of Mr Buckingham will be preferred over the written statement of Mrs Stagg. The circumstances are unusual and the Commission takes into account that the respondent objected to that course of action. The Commission accepted Mr Stagg's undertaking to provide a signed Warrant to Appear as Agent form.
- 7 Having allowed the hearing to continue on that basis, Mr Stagg gave brief evidence. The respondent called Mr Buckingham who gave detailed and lengthy evidence of the circumstances surrounding the dismissal of Mrs Stagg. The Commission has no reason to doubt that Mrs Stagg, and on her behalf Mr Stagg, have approached this matter on a truthful basis. Mr Stagg has said as much. Also, the Commission has no hesitation in finding that Mr Buckingham was a credible witness who gave his evidence truthfully.
- 8 In order to decide whether it would be unfair not to accept Mrs Stagg's claim of unfair dismissal, the following matters are taken into account.  
Whether Mrs Stagg has established that her case has merit and is likely to succeed.
- 9 Mrs Stagg's Notice of Application at paragraph 20 states:  
"I feel I was unfairly dismissed because it wasn't about my work, it was to do with a conflict in personalities with another. We were both given the sack. He wouldn't have one back without the other yet she has been reinstated and I wasn't ..."
- 10 On the evidence before the Commission, Mrs Stagg is mistaken. It is clear that Mrs Stagg was dismissed. However, the other person involved in the arguments with Mrs Stagg was not dismissed. The other person resigned. That is Mr Buckingham's evidence and he also tendered a copy of that person's letter of resignation. When Mr Buckingham dismissed Mrs Stagg he said that "Christine is going as well" and it is likely from this that Mrs Stagg believed that Christine (the other person Mrs Stagg refers to) had also been dismissed. Further, although the other person is working back at the respondent's business, it is for four days a week not five. She has not been "reinstated" as such.
- 11 Further, the only time that Mrs Stagg considered claiming unfair dismissal is after she had heard about the other person returning to work at the respondent. There is no suggestion from Mr Stagg that Mrs Stagg intended to claim unfair dismissal following her dismissal. She may not have intended to do so due to gossip she heard that she may be offered her job back after the Christmas close down which then occurred. The fact remains that the only time the claim of unfair dismissal was talked about by Mrs Stagg was after she heard of the other person returning to work at the respondent.
- 12 Therefore Mrs Stagg has been unable to show that the main reason why she thinks her dismissal was unfair is likely to succeed in a hearing. In fact, it is likely not to succeed.

- 13 Furthermore, Mr Buckingham's evidence confirms the statement in Mrs Stagg's writing regarding the circumstances of her dismissal. There had been a history of arguments between Mrs Stagg and the other person. Mrs Stagg concedes that on at least one occasion Mr Buckingham had told her "in no uncertain terms to pull my head in and bite my tongue, that if push came to shove I would be the one to lose my job". Mr Buckingham's evidence is that he repeatedly told Mrs Stagg, and indeed the other person, that they could both not carry on in this way. The evidence is that there was a serious enough incident between Mrs Stagg and the other person to warrant dismissal and which prompted Mr Buckingham to decide to dismiss Mrs Stagg.
- 14 For all of those reasons it is most unlikely that Mrs Stagg could show that her claim of unfair dismissal has merit.
- Explanation for the delay
- 15 Mrs Stagg states that "in a nutshell, the factory closes its doors for a month every Christmas. I left on 19 December with the belief that I was going to get asked back when they returned on 19 January 2004".
- 16 Had Mrs Stagg's belief been as a result of comments from Mr Buckingham, then her reason for the delay would be understandable. However, it did not. Mrs Stagg found out on 20 January 2004 that the other person was "reinstated" but there was still a delay until 2 February 2004 before referring the claim to the Commission.
- 17 Overall, I am not persuaded that the explanation for the delay is satisfactory.
- The length of the delay
- 18 The first Mr Buckingham knew of Mrs Stagg's intention to claim unfair dismissal was when she rang him on his mobile telephone and spoke to him on 20 January 2004. The delay of 23 days past the 28 day period is not insignificant. It cannot be said that the length of the delay is insignificant because Mr Buckingham knew at the time he dismissed her that Mrs Stagg would be claiming unfair dismissal.
- Prejudice if the claim is accepted or rejected
- 19 Any prejudice to either the respondent and to Mrs Stagg of the decision to be made in this matter is relevant. Mr Buckingham gave evidence of the prejudice his business will suffer if this claim is accepted. He gave evidence of the busy workload he has and the effect of needing to take time off from that business in order to defend the claim. He also stated that it is a very "hands-on" operation. Mr Buckingham's evidence is that he has replaced Mrs Stagg and that the business, which employs only 19 persons, is now running smoothly. This leads to the conclusion that there would be significant prejudice to the respondent if the claim is allowed to proceed.
- 20 There will also be prejudice to Mrs Stagg. She lost what she has described in her written statement as her "safety net wage to pay the mortgage and supply food for her family". She has stated that she has felt physically ill as a result of the dismissal. For Mrs Stagg to lose her employment in those circumstances is such that if her claim is not accepted by the Commission she will be denied the opportunity to put an argument for possible reinstatement or compensation. However, because her claim on merit is not strong, and because there is at least some likelihood that she would have resigned in the near future in any event (she having written out a letter of resignation and kept it in her bag for the next occasion there was an incident that overwhelmed her) the prejudice to Mrs Stagg if her claim is not accepted is not greater than the prejudice to the respondent if the claim is refused.
- 21 For all of the above reasons, the case presented in her written application and in the hearing did not persuade me that it would be unfair not to accept her claim. It would hardly be fair to either Mrs Stagg or the respondent to accept a claim out of time that, on the evidence before the Commission including Mrs Stagg's handwritten pages, is unlikely to succeed in any event.
- 22 Accordingly, the decision of the Commission is that Mrs Stagg's application is hereby dismissed and an order to that effect now issues.

2004 WAIRC 10894

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	JOANNE MARGARET STAGG	<b>APPLICANT</b>
	-v-	
	NELL GRAY MANUFACTURING	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	TUESDAY, 16 MARCH 2004	
<b>FILE NO</b>	APPLICATION 129 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 10894	

<b>Result</b>	Application out of time dismissed.
<b>Representation</b>	
<b>Applicant</b>	Mr N.A. Stagg (as agent)
<b>Respondent</b>	Mr D. Johnston (as agent)

*Order*

HAVING HEARD Mr N.A. Stagg (as agent) on behalf of the applicant and Mr D. Johnston (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders -

THAT the application be dismissed.

[L.S.]

(Sgd.) A R BEECH,  
Senior Commissioner.

2004 WAIRC 10875

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	RAY JOHN STEIN	<b>APPLICANT</b>
	-v-	
	CLASSIC PRODUCTS PTY LTD T/AS CLASSIC BAKERY	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J H SMITH	
<b>DATE</b>	MONDAY, 15 MARCH 2004	
<b>FILE NO.</b>	APPLICATION 1507 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10875	

<b>Catchwords</b>	Contractual benefits claim – Application granted – <i>Industrial Relations Act 1979</i> (WA) s 27(1)(b)(ii)
<b>Result</b>	Application granted. Order made the Respondent pay the Applicant \$12,175.00
<b>Representation</b>	
<b>Applicant</b>	In Person
<b>Respondent</b>	In Person

*Reasons for Decision*

- 1 This is an application made under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). Ray John Stein ("the Applicant") claims that he is owed benefits to which he is entitled under a contract of employment, not being a benefit under an award or order. The Applicant claims he is owed:-
- |     |  |       |          |
|-----|--|-------|----------|
| (a) | Nine weeks' wages at the rate of \$650 per week    | =     | \$5,850  |
| (b) | Seven weeks' wages at the rate of \$775 per week   | =     | \$5,425  |
| (c) | Two weeks' pay in lieu of notice at \$775 per week | =     | \$1,550  |
|     |  | Total | \$12,825 |
- 2 The Applicant was engaged by Classic Products Pty Ltd trading as Classic Bakery ("the Respondent") from 1 October 2002 until 20 July 2003. The Applicant says that he was employed by the Respondent as its bakery manager.
- 3 The Respondent says that the Applicant is not an employee, he was engaged as a contractor. Alternatively, the Respondent says that even if the Commission finds that the Applicant was engaged by the Respondent as an employee the Respondent does not owe the amounts claimed by the Applicant.
- 4 Attached to the Applicant's application is a schedule setting out the hours he says he worked each week and the payments he received from the Respondent. This document is as follows:

Week Ending	Hours Worked -std = 38 hrs	Hours Worked Overtime	Pay from Classic Bakery
04 Oct 2002	38 Mon - Fri	0	\$200.00
11 Oct 2002	38 Mon - Fri	0	\$250.00
18 Oct 2002	38 Mon - Fri	0	\$300.00
25 Oct 2002	38 Mon - Fri	0	\$350.00
01 Nov 2002	38 Mon - Fri	0	\$400.00
08 Nov 2002	38 Mon - Fri	0	\$400.00
15 Nov 2002	40 Mon - Sat	2	\$650.00
22 Nov 2002	40 Mon - Sat	2	\$650.00
29 Nov 2002	40 Mon - Sat	2	\$650.00
06 Dec 2002	40 Mon - Sat	2	\$650.00
13 Dec 2002	40 Mon - Sat	2	\$650.00
20 Dec 2002	40 Mon - Sat	2	\$650.00
27 Dec 2002	40 Mon - Sat	2	\$650.00
03 Jan 2003	45 Mon - Sat	7	NOT PAID
10 Jan 2003	45 Mon - Sat	7	\$650.00
17 Jan 2003	50 Mon - Sat	12	\$650.00
24 Jan 2003	50 Mon - Sat	12	\$650.00
31 Jan 2003	50 Mon - Sat	12	\$650.00
07 Feb 2003	50 Mon - Sat	12	\$650.00
14 Feb 2003	50 Mon - Sat	12	\$650.00
21 Feb 2003	50 Mon - Sat	12	NOT PAID
28 Feb 2003	50 Mon - Sat	12	NOT PAID
07 Mar 2003	50 Mon - Sat	12	NOT PAID
14 Mar 2003	50 Mon - Sat	12	\$650.00
21 Mar 2003	50 Mon - Sat	12	NOT PAID

Week Ending	Hours Worked -std = 38 hrs	Hours Worked Overtime	Pay from Classic Bakery
28 Mar 2003	50 Mon - Sat	12	NOT PAID
04 Apr 2003	50 Mon - Sat	12	NOT PAID
11 Apr 2003	50 Mon - Sat	12	NOT PAID
18 Apr 2003	50 Mon - Sat	12	NOT PAID
25 Apr 2003	50 Mon - Sat	12	\$650.00
02 May 2003	55 Mon - Fri	17	\$775.00
09 May 2003	58 Mon - Fri	20	NOT PAID
16 May 2003	87 Mon - Fri	49	\$775.00
23 May 2003	63 Mon - Fri	25	NOT PAID
30 May 2003	55 Mon - Fri	17	\$775.00
06 Jun 2003	53 Mon - Fri	15	NOT PAID
13 Jun 2003	46 Mon - Fri	8	NOT PAID
20 Jun 2003	48 Mon - Fri	10	NOT PAID
27 Jun 2003	50 Mon - Fri	12	\$775.00
04 Jul 2003	50 Mon - Fri	12	\$775.00
11 Jul 2003	50 Mon - Fri	12	NOT PAID
18 Jul 2003	50 Mon - Fri	12	NOT PAID
<b>Total Paid</b>			<b>\$26,750.00</b>

### The Applicant's Evidence

- 5 The Applicant is an experienced pastry cook. He however, does not hold any formal qualifications. The Applicant had been employed casually for another employer who had previously operated a bakery business at the same premises as the Respondent's business.
- 6 The Applicant approached the Respondent's Director, Mr Haluk Bilek and they reached an agreement to start work for the Respondent in October 2002. They agreed he would be paid \$200 (gross) for the first week and his wages would be increased by \$50 per week each week and on 15 November 2002 he was to start at \$650 (gross) per week. During that period of time another employee said that they did not wish to "manage the place". The position of manager was offered to the Applicant and he agreed to take up that position. It is uncontested that the Applicant had a considerable amount of experience as a pastry cook and brought his own recipes with him, which were cooked by him and by other persons who worked in the Respondent's bakery.
- 7 The Applicant said that he had his own catering consultancy business in early 2002, but he did not carry out any work for his own business whilst he worked for the Respondent.
- 8 The Applicant says that he initially worked six days a week but in about March 2003, he cut down his days of work to five days a week because he was not receiving all of his wages from the Respondent. He said each day he spent 80% to 90% of his time baking products and ordering supplies for the bakery. His hours of work fluctuated up to 50 hours a week. He said he usually commenced work between 4:00 am to 6:00 am each morning and worked until late in the afternoon. Any one time there were two to six staff working in the bakery. Mr Bilek also worked in the business each day carrying out deliveries with his wife and his brother. The Applicant did not wear a uniform, he wore light clothing and a white apron. He said that all persons who worked in the bakery wore white or red coats.
- 9 When cross examined the Applicant conceded that when he reached agreement to work in the bakery he did not discuss start and finish times with Mr Bilek, nor was there any agreement or direction given to him by Mr Bilek about what clothing was to be worn. Further, the Applicant conceded that Mr Bilek gave no directions to him about the making of pastries. In cross examination the Applicant denied making goods for his own sale at the Respondent's premises.
- 10 The Applicant says that the Respondent, Mr Bilek acknowledged he was an employee of the Respondent in a number of documents. These are as follows:-
- (a) Mr Bilek signed a letter dated 19 December 2002, which stated "To whom it may concern" that the Applicant is "currently employed at Classic Bakery commencing from 1st October 2002 as manager. His gross income is \$650. Per week."
- (b) In response to a summons to the Applicant to attend jury duty, Mr Bilek signed a letter which states:-  
 "To whom it may concern,  
 One of my workers a 'Raymond J Stein' has been summoned to jury duty on the 31st March 2003. Im [sic] sorry but there is no possible way I could spare him at the moment.  
 I have just started up a bakery called 'Ace Bakery'/Classic Bakery'. Ray, not only makes the products he also bakes them, puts orders in, monitors our new Apprentice & supervisors [sic] all of my other staff. Unfortunately being a new bakery things are a bit tight & there is no one else to replace him just yet."
- (c) In April 2003, the Applicant says he renegotiated his wages with Mr Bilek. He says Mr Bilek agreed to increase his wages from \$650 (gross) per week to \$775 (gross) per week when he informed Mr Bilek he would be leaving unless his wages were paid and he received an increase. On 2 May 2003, Mr Bilek signed a letter which states:-  
 "To whom it may concern,  
 Mr Ray Stein has been employed with Classis Bakery since October 2002 as Production Manager.  
 His weekly wage is:
- |         |   |        |
|---------|---|--------|
| Gross   | - | \$775. |
| Taxq    | - | \$175. |
| Nett    | - | \$600. |
| Supa 9% | - | 69.75¢ |

Mr Stein's wages will be reviewed on the 1st July 2003."

- 11 On 12 May 2003, Mr Bilek signed a handwritten document which records an amount of \$4,000 outstanding as payment in wages to the Applicant. The carbon copy of this document states as follows:-

"HALUK BILEK

PERSONAL DEBT (Classic Bakery) 93 Winton Road Joondalup 6027

MONEY OWED IN BACK WAGES

Plus Holiday Pay, Leave Loading

	Tax Repayments	Superannuation Payments	
From: Nov 15th 2002	\$650.	Gross	
Weekly pay	\$150.	Tax	
	\$500.	Nett	
	\$ 58.50	Supa	

To: 28th April 2003

WAGE OWED PLUS 1 WEEKS WAGES BEHIND 6th JAN 2003

Fri 21 Feb – Mon 24 Feb	500	-	500
Fri 28 Feb – Mon 3 Mar	500	-	500
Fri 7 Mar – Mon 10 Mar	500	-	500
Fri 14 Mar – Mon 17 Mar	Paid \$500	-	-
Fri 21 Mar – Mon 24 Mar	500	-	500
Fri 28 Mar – Mon 31 Mar	500	-	500
Fri 4 Apr – Mon 7 Apr	500	-	500
Fri 11 Apr – Mon 14 Apr	500	-	500
Fri 18 Apr – Mon 21 Apr	500	-	500

\$4,000"

- 12 In support of the Applicant's claim that he was not paid the amounts set out in the schedule to his application from 9 May 2003 until 18 July 2003, the Applicant also produced a bundle of Qantas ANZ Visa card statements, StateWest Credit bankcard account statements and BankWest cheque account statements. He also produced pages from his diary from 28 April 2003 until 20 July 2003, which contained notes made by him of hours of work and wages received from the Respondent.
- 13 During the course of the Applicant's engagement the Applicant loaned Mr Bilek sums of money on a number of occasions. Mr Bilek tendered into evidence copies of particulars of claim filed by the Applicant and particulars of defence filed by Mr Bilek in the Local Court. The particulars of claim record that it is alleged by the Applicant that he lent sums of money to Mr Bilek between 13 January 2003 and April 2003. It is not disputed by Mr Bilek in these proceedings that the Applicant lent sums of money to him. The Applicant says that after he lent the sums of money he received some payments, an IOU relating to loans and that he received two payments of \$90. The Applicant says he accounted for two amounts of \$90 by providing the Respondent with two invoices which stated the amounts were for sales representations in promotion of new product lines for Action and Coles stores being four hours work at an hourly rate of \$22.50. The Applicant also testified that on two occasions he banked two of the Respondent's cheques paid by "Stellar Call Centre" and deducted those amounts from the debt which was owed to him by Mr Bilek. He however, maintains the cheques and the two amounts of \$90 were not paid to him as wages owing by the Respondent and he has received no amounts which should be set off against his wages.
- 14 The Applicant testified that he served a letter of demand on Mr Bilek for the unpaid debt on 16 July 2003, and on the same day he gave four weeks notice to terminate his employment. He says he tended his resignation in writing. However, he testified that his copy of the resignation letter has been lost. The Applicant says that after he gave notice he worked on Friday, 18 July 2003. On Sunday, 20 July 2003, Mr Bilek telephoned him, told him not to come back to work and that Mr Bilek also advised him he (the Applicant) was going to be charged with stealing. The Applicant says it was because he (the Applicant) had gone into the general office and collected his recipes. Mr Bilek told him that he would not pay him any pay in lieu of notice. The Applicant says he had the recipes for about 10 years. When he started working with the Respondent he started to use his own recipes. When everything started going sour he took the recipes back. These recipes had been used by the Respondent for goods they baked for Jiffy Foods. The Applicant testified that since his employment was terminated he has not been charged or spoken to by the police about any offences in relation to this matter.
- 15 The Applicant also sought to tender into evidence three affidavits made by three persons who have sworn affidavits that they worked for the Respondent's business whilst the Applicant was engaged. He informed the Commission that he had not taken steps to summons them to attend because they had previously attended a hearing in the Industrial Magistrate's Court and he did not think they should take another day off work to attend a hearing in these proceedings. The Respondent opposes the application to tender the affidavits. The Commission reserved its decision as to whether those affidavits would be admitted into evidence of these proceedings.

#### The Respondent's Evidence

- 16 Mr Bilek testified that he is the sole director of the Respondent. He said that the Respondent commenced its business, Classic Bakery, in about February 2002. He said that he engaged the Applicant after the Applicant came into the Respondent's premises and presented him (Mr Bilek) with a business card, "Bluez Cluez Management and Consultancy". Mr Bilek said that the Applicant informed him that he had worked in the bakery when it was occupied by another business. He says the Applicant told him he could build his (the Respondent's) business up and that he had his own customers. Mr Bilek said that he only wanted to engage contractors to work in the business and casual employees after he had discussed the implications of engagement of employees with his accountant. Mr Bilek testified he entered into an agreement with the Applicant for the Applicant to work as a contractor whereby the Applicant would bring in new customers and produce new lines for the bakery. Mr Bilek said that prior to the Applicant commencing work he intended that Classic Bakery would produce only Turkish bread and cookies, and not pastries because he (Mr Bilek) is not a baker.
- 17 Mr Bilek says that the Applicant engaged other persons to work in the business with the Applicant baking pastries. Mr Bilek says except for one person, they were either engaged as contractors or as casuals.

- 18 Mr Bilek says that the Applicant supplied his own personal tools and recipes and they (the Respondent) supplied the fixed equipment. Mr Bilek contended that the Applicant was paid at the end of each month after he (Mr Bilek) invoiced the Applicant for goods he was selling to other people and then they would deduct these amounts from the amounts the Respondent owed him. Mr Bilek however, did not produce any invoices to the Commission other than two invoices referred to in paragraph 13 above and these were invoices produced by the Applicant and were for work carried out in May 2003.
- 19 Mr Bilek says that he signed the documents set out in paragraphs 10 above "as a favour" to the Applicant, as the Applicant needed this information to provide to his bank and to the bailiff. In relation to the document signed by Mr Bilek dated 12 May 2003, in which \$4,000 is said to be outstanding in wages, Mr Bilek said that although he signed this document the original was kept by Mr Stein and the "original" also "records" amounts that were paid to the Applicant to satisfy a substantial amount of the amounts outstanding, but he (Mr Bilek) did not have a record of what was paid other than to say that he could recall an amount of \$400 was paid on one occasion.
- 20 Mr Bilek says that the Applicant informed him on 16 July 2003 that he did not intend to work anymore. Mr Bilek said that he looked at video footage from the shop and saw that the Applicant had gone into the office and taken some documents. Mr Bilek said that he rang the Applicant on the Sunday, 20 July 2003, and the Applicant had admitted he had gone into the office and taken recipes. Mr Bilek however, contends that the Applicant did not take his (the Applicant's) own recipes but that the Applicant took other documents. However, Mr Bilek was unable to say what documents were taken because he could not see from looking at the video what was removed.

#### Admissibility of the Affidavits

- 21 Affidavits can in certain circumstances be admitted into evidence where the requirement of s 79C of the *Evidence Act 1906*, are met. Section 79C(1) and (2) of the *Evidence Act* provides:
- "(1) Subject to subsection (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if the statement —
- (a) was made by a qualified person; or
  - (b) directly or indirectly reproduces or is derived from one or other or both of the following —
    - (i) information in one or more statements, each made by a qualified person;
    - (ii) information from one or more devices designed for, and used for the purpose of, recording, measuring, counting or identifying information, not being information based on a statement made by any person.
- (2) Where a statement referred to in subsection (1) is made by a qualified person or reproduces or is derived from information in a statement made by a qualified person, that person must be called as a witness unless —
- (a) he is dead;
  - (b) he is unfit by reason of his bodily or mental condition to attend or give evidence as a witness;
  - (c) he is out of the State and it is not reasonably practicable to secure his attendance;
  - (d) all reasonable efforts to identify or find him have been made without success;
  - (e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;
  - (f) having regard to the time which has elapsed since he made the statement and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
  - (g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or
  - (h) he refuses to give evidence."

22 A "qualified person" is defined in s 79B to include a person who had at the time of making the statement, or may reasonably be supposed to have had at that time personal knowledge of the matters dealt with by the statement.

23 Having read the affidavits of Charmaine Amy Sparg, Tony Stuart Signal and Nola Avie Johnson, I am of the view that the affidavits should not be admitted into evidence. The reason why I have reached this view is that statements contained in the affidavits have almost no probative value in that they do not contain evidence which goes to the issues in dispute, that is whether the Applicant was engaged by the Respondent as an employee or a contractor or whether he was paid the amounts claimed by him as wages. In light of my findings the affidavits will not be admitted into evidence.

#### Employee or Contractor

- 24 It is not for the Respondent to show that the Applicant was not an employee but for the Applicant to show, on the balance of probabilities, that he was an employee (*The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd t/as Florida Exclusive Pools* (1996) 77 WAIG 4 at 8 per Fielding SC).
- 25 I observed in *Howe v Intercorp Services Pty Ltd trading as WestVision Painting Company* [2001] WAIRC 2643 at [24] and [25]; (2001) 81 WAIG 1212 at 1214 that:

"The relationship of employer and employee is a contract of service where an employee contracts to provide his or her work and skill (typically to enable an employer to achieve a result). An independent contractor works in his or her own business on his or her own account. Whilst the authorities do not establish a conclusive test for determining whether a person is an employer, regard must be had to the whole of the relationship. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 Mason J at 24 and Wilson and Dawson JJ at 36 held that a prominent factor is the degree of control which the person (who engages the other) can exercise over the person engaged to perform work. The High Court also held that the existence of control is not the sole criteria, other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to provide exclusive services, provision for holidays, deduction of income tax, delegation of work, the right to suspend or dismiss, the right to dictate the place of work and hours of work. Further, Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* at 26 to 27 also observed that in some cases the organization test can be a further factor to be weighed (along with control), in deciding whether the relationship is one of employment or of independent contractor. The organization test is whether the party in question is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not for a superior (*Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 per Lord Wright at 169).

Whilst regard can be had to whether the parties regarded their contractual relationship one of employee/employer or independent contractor, if the evidence shows otherwise the parties cannot alter the truth of that relationship by putting another label on it (*Massey v Crown Life Insurance Co* (1978) 1 WLR 676 and *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 2 NSWLR 601)."

26 The distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own" (*Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 per Windeyer J at 217; see also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per McHugh J at 366; approved by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [40]; (2001) 181 ALR 263 at 275).

27 The notion of "control" and its adjustment to the circumstances of contemporary life was recently re-considered by the majority of High Court in *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [43-44]; (2001) 181 ALR 263 at 276; where Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ observed:

"... In *Humberstone* [62], Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out [63]:

'The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one.'

It was against that background that in *Brodribb* [64] Mason J said that, whilst these criticisms might readily be acknowledged:

'the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers Pty Ltd* [65]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.' "

28 Whilst Anderson J, with whom Scott J agreed, recently observed in *United Construction Pty Ltd v Birighitti* [2003] WASCA 24 at [16]; (2003) WAIG 434 at 437, that the most important indicia pointing to the continuation of the relationship as one of master and servant is the degree of control, the High Court has pointed in *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 many skilled workers are not amenable to detailed control, what matters is lawful authority to command so far as there is scope for it. The person found to be an employee in the *Zuijs* case was a trapeze artist.

29 Having heard the evidence given by the Applicant and the Respondent I prefer the evidence given by the Applicant to the Respondent. I do not find the Respondent to be a credible witness. In particular his evidence that the Applicant was paid for work each month after an invoice was produced by the Applicant is not supported by the Applicant's bank statements which showed fortnightly regular payment of amounts consistent with the nett payments in the document set out in paragraph 11 above. Further, the Respondent produced no monthly invoices to support his case. I reject Mr Bilek's evidence that he reached an agreement with the Applicant to engage him as a contractor. The documents set out in paragraph 10 above signed by Mr Bilek clearly describe the Applicant as an employee.

30 I reject the Respondent's argument that the Applicant was engaged as a contractor. The reasons why I have reached this view are as follows:

- (a) I do not regard the fact that the Applicant determined what pastries to bake and how they should be baked as material. He is skilled in this craft whereas it is clear Mr Bilek had no skills in this work. There is no reliable evidence that the Applicant was carrying on his business by baking good for his own sale. At all material times the Applicant was producing pastries for the Respondent's business. Whilst the hours of work were left to the Applicant it is apparent that he worked the hours that were necessary to produce goods for delivering to the Respondent's customers.
- (b) The Respondent treated the Applicant as an employee, in that he was usually paid the same amount each week and tax was apparently deducted. I do not accept Mr Bilek's contention that because the Applicant interviewed and recommended to him (Mr Bilek) that other persons be engaged in the bakery that the Applicant was a contractor. This conduct is consistent with the role of the manager who is vested with the day to day management of work and has the delegated authority to hire and dismiss employees.

31 In light of all the evidence I will make a finding that the Applicant was engaged as an employee by the Respondent.

#### **Claim for Unpaid Wages**

32 It is implied in all contracts of employment that an employee's employment cannot be terminated except by reasonable notice. This obligation does not apply where an employee's employment is terminated on grounds which justify summary dismissal.

33 With the exception of the amount claimed for wages due on 3 January 2003, I am satisfied the amounts claimed by the Applicant are amounts due and owing to him under his contract of employment. The reason why I am not satisfied the amount claimed as due on 3 January 2003, should be paid is that this amount is not referred to in the acknowledgement of "money owed in back wages" set out in paragraph 11 of these reasons. That document set out all the amounts claimed up until the amount due on 18 April 2003. As to the amounts claimed from 9 May 2003 until 18 July 2003, it is clear from the bank statements tendered into evidence that payments of wages were not received on the dates claimed.

34 In light of my findings I will make an order that the Respondent pay the Applicant \$10,625.00 (gross) as benefits to which the Applicant is entitled under a contract of employment.

#### **Claim for Two Weeks Pay in Lieu of Notice**

35 The Applicant testified that he gave the Respondent four weeks' notice and after he had done so, he worked two days until Friday 18 July 2003. His employment was summarily terminated within the notice period on 20 July 2003 by the Respondent. The Applicant did not attend work after 20 July 2003. The Applicant claims the Respondent should have provided him with reasonable notice and a period of reasonable notice would in all the circumstances have been two weeks' pay.

- 36 The principles to be applied in considering what will constitute reasonable notice were summarised by Beech C in *Scanlan v Greenport Nominees Pty Ltd t/a Indiana Tea House* (1998) 78 WAIG 4452 at 4454 where he observed:  
 "... What period will constitute reasonable notice depends upon the facts (*Quinn v Jack Chia (Australia)* [1992] 1 VR 567, (1991) 43 IR 91; *Irons v Merchant Capital* (1994) 116 FLR 204; *Cohen -v- Nichevic* [1976] WAR 183). That requires a determination of what a reasonable period of notice would have been in this case (*Quinn v Jack Chia (Australia)*, above). Reasonable notice is to be assessed at the time it is to be given not at the time of the commencement of the contract (*Quinn v Jack Chia (Australia)*, above; and cf. *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 All ER 722). What constitutes reasonable notice will be calculated according to each particular circumstance by balancing a number of factors (see for example *Dyer v Peverill* (1979) 2 NTR 1). A number of those factors are conveniently summarised by the authors of The Law of Employment, Macken, McCarry and Sappideen, 4th ed., p.166 - 167..."
- 37 The factors considered by the authors of *The Law of Employment* were also considered by the Full Bench of this Commission in *Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499 at 2501. Those factors are:  
 "(a) The high or low grade of the appointment.  
 (b) The importance of the position.  
 (c) The size of the salary.  
 (d) The nature of the employment.  
 (e) The length of service of the employee.  
 (f) The professional standing of the employee.  
 (g) His/her age.  
 (h) His/her qualifications and experience.  
 (i) His/her degree of job mobility.  
 (j) What the employee gave up to come to the present employer (eg a secure longstanding job.  
 (k) The employee's prospective pension or other rights."
- 38 The onus of proof rests upon the Respondent to establish it had the right to terminate the Applicant's employment without proper notice (see *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 66 at 83). I am satisfied that in all the circumstances that the Respondent has not provided that its action in summarily terminating the Applicant's employment was not justified. I am not satisfied the Applicant removed copies of documents other than the recipes that belonged to him from the Respondent's office.
- 39 Whilst the Applicant could have claimed an amount equal to the balance of the four weeks' notice he intended to work he is only claiming two weeks' pay in lieu of notice. In circumstances where the Applicant was appointed at the commencement of his employment as a skilled craftsman to prepare and cook goods that were not previously produced by the Respondent, I am satisfied the Applicant should have been given two weeks' notice.
- 40 Accordingly, I will also order that the Respondent do pay the Applicant the sum of \$1,550.00 (gross) as a benefit to which he is entitled under his contract of employment.

2004 WAIRC 10938

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

RAY JOHN STEIN

**APPLICANT**

-v-

CLASSIC PRODUCTS PTY LTD T/AS CLASSIC BAKERY

**RESPONDENT**

**CORAM**

COMMISSIONER J H SMITH

**DATE OF ORDER**

WEDNESDAY, 19 MARCH 2004

**FILE NO.**

APPLICATION 1507 OF 2003

**CITATION NO.**

2004 WAIRC 10938

**Result**

Application granted. Order made the Respondent pay the Applicant \$12,175.00.

**Representation**

**Applicant**

In Person

**Respondent**

In Person

*Order*

HAVING heard Mr R Stein on behalf of the Applicant and Mr H Bilek on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

DECLARES that the Applicant's claim that he has not been allowed by the Respondent a benefit not being a benefit under an award or order, to which he is entitled under his contract of employment;

ORDERS that the Respondent pay to the Applicant within 14 days of the date of this Order the sum of \$12,175.00;

ORDERS that the application is otherwise and is hereby dismissed.

(Sgd.) J H SMITH,  
Commissioner.

[L.S.]

2004 WAIRC 10877

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MARK WATTS	<b>APPLICANT</b>
	-v-	
	NORBERT VAN HEERWAARDEN (NORWATCH PTY-LTD)	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J H SMITH	
<b>DATE</b>	FRIDAY, 12 MARCH 2004	
<b>FILE NO.</b>	APPLICATION 1525 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10877	

<b>Catchwords</b>	Interlocutory Applications ss 26, 29(1)(b), 32 and 32A of the <i>Industrial Relations Act 1979</i> (WA).
<b>Result</b>	Application to substitute the name of the Respondent granted. Order made declaring the Commission does have jurisdiction to hear and determine the Application under s 29(1)(b)(i) and (ii). Application for the Commission as presently constituted to disqualify itself from exercising arbitration functions dismissed. Applications for costs dismissed.
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Mr D Smith (of counsel)
<b>Ron Watts Investments Pty Ltd</b>	Mr R Watts

*Reasons for Decision*

- 1 Mark Watts ("the Applicant") filed an application on 21 October 2003, claiming he was harshly, oppressively and unfairly dismissed by Norbert van Heerwaarden (Norwatch Pty Ltd) ("the Respondent") on 13 October 2003. The Applicant also claims that he is owed benefits by the Respondent under his contract of employment.
- 2 In paragraph 8 of the Particulars of Claim, Norbert van Heerwaarden is stated as the contact name (i.e. Manager – Supervisor) and the Respondent's trading address or registered office is stated as "PO Box 220 Capel WA (Capel Marron) 584 Goodwood Road, Capel". In paragraph 20 of the Particulars of Claim it is stated "I was employed by Capel Marron which is 50/50 owned. Only 50% of partnership took this move to dismiss."
- 3 The Respondent's solicitor filed a Notice of Answer and Counter Proposal on 14 November 2003, in which it is stated that the Applicant was employed by Ron Watts Investments Pty Ltd and Norwatch Pty Ltd trading as Capel Marron Farm. In paragraph 33 of the Notice of Answer and Counter Proposal it is stated:
 

"By the end of the day, the Respondent had had enough of this behaviour and subsequently the Respondent gave the Applicant a note which read:-

'As a result of how you confronted me on Friday, how you said it, what you said, your contempt, and the way you continued to show contempt after the confrontation, and your total lack of respect to me, one of your employers, have left me no choice but to terminate your services...'
- 4 On 13 January 2004, the Commission convened a conciliation conference. It is common ground that the issue that Norbert van Heerwaarden was not personally the employer of the Applicant and that the Applicant should take steps to amend his application was raised at the conference.
- 5 On 15 January 2004, the Commission received a letter from the Respondent's solicitor stating:
 

"I also confirm that, in the absence of any application by the Applicant to amend his Application, we would wish to argue as preliminary issues:-

  - (i) The question of whether the Commission has Jurisdiction in this matter at all.
  - (v) The question of whether it is appropriate for the Honourable Commissioner J.A. Smith [sic] to hear the substantive matter, given that she presided over the Conciliation Conference on the 13/1/2004."
- 6 On 21 January 2004, the Applicant's application was set down for hearing for two days to commence on Tuesday, 24 February 2004, at Bunbury.
- 7 On Friday, 20 February 2004, the Applicant filed a Form 1 to request leave to amend the name of the Respondent to Capel Marron (Norwatch Pty Ltd & Ron Watts Investments Pty Ltd). For reasons which were not the fault of the Applicant a copy of this application was not served on the Respondent's solicitor until Monday, 25 February 2004.
- 8 Mr Ronald Watts appeared on behalf of Ron Watts Investments Pty Ltd. He informed the Commission he is a director of the Respondent and that Ron Watts Investments Pty Ltd did not object to being joined as a party to the proceedings, that in his view the Applicant was unfairly dismissed by Norwatch Pty Ltd. He also stated that Ron Watts Investments Pty Ltd denies that it is liable for the actions of Norwatch Pty Ltd. Mr Ronald Watts informed the Commission that it is not denied that Mr van Heerwaarden was the manager of Capel Marron but that the terms of the partnership agreement had the effect of making the manager's position held by Mr van Heerwaarden conditional.
- 9 At the hearing on 24 February 2004, counsel for the Respondent argued that although the Commission had power under s 27(j) and (l) of the *Industrial Relations Act 1979* ("the Act") to make the amendment sought by the Applicant, the Commission should not do so unless Mr Norbert van Heerwaarden in his personal capacity is struck out as a Respondent and the hearing of the Applicant's claim under s 29(1)(b)(i) and (ii) was adjourned.
- 10 The Respondent submitted the reason why a hearing of the merits of the claim should be adjourned is that Norwatch Pty Ltd would be prejudiced by the joinder of Ron Watts Investments Pty Ltd as there is a dispute between Norwatch Pty Ltd, the

Applicant and Ron Watts Investment Pty Ltd whether Mr van Heerwaarden was the manager of Capel Marron. The Respondent says that because of the lateness of the application to amend:

- (a) Norwatch Pty Ltd will need to consider producing documents and calling evidence in relation to management issues between Norwatch Pty Ltd and Ron Watts Investments Pty Ltd.
- (b) Norwatch Pty Ltd had insufficient time to prepare for this issue insofar as it arises between Norwatch Pty Ltd and Ron Watts Investment Pty Ltd.

11 After hearing the parties the Commission determined that it should grant leave to amend the name of the Respondent by deleting the name of Norbert van Heerwaarden (Norwatch Pty Ltd) and substitute Norwatch Pty Ltd and Ron Watts Investments Pty Ltd trading as Capel Marron. The Commission also determined it should grant the application for an adjournment. In granting the application the Commission had regard to the decision of the Full Bench in *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and the High Court in *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* (1991) 173 CLR 231.

12 In *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* (op cit) McHugh J held at 261 there are three limitations on a person's right to amend:

"First, there must be a mistake. Second, by the mistake must be 'in the name of the party'. Third, by the court may only make the order where it is satisfied that any other party to the proceeding would not be reasons of the order be prejudiced in the conduct of his or her claim or defence in a way that could be fairly met by an adjournment, an award of costs or otherwise."

13 In this matter I was satisfied that the prejudice to Norwatch Pty Ltd can be fairly met by an adjournment.

14 Counsel for Mr van Heerwaarden made an application that costs fixed at \$150 be paid by the Applicant (not being costs for an amount for the services of a legal practitioner) in attending a conciliation conference and the hearing. The principles that apply to an award of costs were set out by the Full Bench in *Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 in which the Full Bench held at 27:

"The application, too, must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award* (1983) AIRL 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order)."

15 After considering the principle enunciated by the Full Bench in *Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (op cit) and paragraph 33 of the Respondent's Notice of Answer and Counter Proposal the Commission observed that the Respondent itself referred to Mr van Heerwaarden as one of the Applicant's employers which may have led the Applicant into confusion in wrongly naming his employer in his application for unfair dismissal and contractual benefits. The Commission then determined that the application for costs should be dismissed.

16 Counsel outlined the other preliminary issues raised in the letter to the Commission (set out in paragraph 5 of these reasons) as follows:

- (a) In relation to the argument whether the Commission has jurisdiction in this matter at all, the Respondent says the Applicant was employed by two corporations incorporated pursuant to the Corporations Law which is a Law of the Commonwealth. Further the employment was covered by an unsigned and unregistered agreement which was at some stage intended to be registered under the *Workplace Relations Act 1996* to register as and Australian Workplace Agreement. Consequently, it is argued this matter should have been pursued in the Australian Industrial Relations Commission.
- (b) It is inappropriate for members of the Commission who convene conciliation proceedings to conciliate and then arbitrate. However, this argument is raised on the basis that matters are raised at conciliation conferences that are likely to stay in the mind of a Commissioner who presided over the conference which cannot be put out of their mind when arbitrating a matter. This argument is put without any contention that the Commission as presently constituted is biased or that the doctrine of apprehended bias has any application.

17 In relation to the argument that the Commission has no jurisdiction in this matter, the Commission is of the view that this argument is misconceived. In *City of Mandurah v Hull* [2000] WASCA 216; (2000) 80 WAIG 4319 the Industrial Appeal Court held that the fact that an employee's employment covered by a Federal award did not oust the jurisdiction of the Western Australian Industrial Relations Commission to hear a claim by the employee that he was harshly, oppressively or unfairly dismissed. In this case it is not alleged the Applicant's employment was covered by a Federal instrument. It is apparent from the Notice of Answer and Counter Proposal the contention that the agreement was unregistered under the *Workplace Relations Act*, it follows as a matter of law that the terms of the agreement formed a common law contract of employment. Pursuant to s 29(1)(b) of the Act, the Commission is seized with jurisdiction to hear and determine the Applicant's claim.

18 As the second argument, the conciliation conference was presided over by the Commission under s 32 of the Act. Pursuant to s 32(6) following conciliation the Commission may decide the matter by arbitration if it:

- "(a) is satisfied that further resort to conciliation would be unavailing; or
- (b) is requested by all the parties to the proceedings to decide the matter by arbitration."

19 Under s 32(7):

"Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation."

Section 32(7) contemplates that the Commission may retain some knowledge of what occurred at a conference. However, the Commission must, in my view, when arbitrating only determine the issues in dispute between the parties on the evidence and submissions put before the Commission in the arbitration proceedings. Section 32A also relevantly recognises that conciliation functions can be performed after arbitration functions have ceased. Sections 32 and 32A inherently recognise that conciliation and arbitration functions can be performed by the same member of the Commission. The practice and procedure of the Commission under s 32 can be contrasted with compulsory conferences convened by the Commission under s 44(1) and (7) of the Act. Pursuant to s 44(10), (11) and (12) a party to the proceeding may object to the Commissioner who presided over the conference hearing the matters in dispute. Whilst such a procedure is not provided for in relation to matters set down for arbitration under s 32 of the Act, it does not follow that in all matters that a Commissioner who presides over a conference should not disqualify him or herself from exercising arbitration functions. Where the tests for bias or apprehended bias are met in a particular case it would not be appropriate for a member of the Commission to carry out arbitration functions in respect of

that matter (see *O'Toole v Mulberry Enterprises Pty Ltd t/a Ampol Maddington* (1995) 75 WAIG 1667 and *Commonwealth Bank v Heap* (2002) 117 IR 28). As set out above no such contention is raised by the Respondent in this matter.

20 For the reasons set out above I will make an order:

- (a) That the name of the Respondent be deleted and that be substituted therefor the name, Norwatch Pty Ltd and Ron Watts Investments Pty Ltd trading as Capel Marron.
- (b) Declaring that the Commission does have jurisdiction to hear and determine the Applicant's application under s 29(1)(b)(i) and (ii) of the Act.
- (c) That the application for the Commission as presently constituted to disqualify itself from exercising arbitration functions be dismissed.
- (d) That the Respondent's Application for costs be dismissed.

2004 WAIRC 10930

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MARK WATTS	<b>APPLICANT</b>
	-v-	
	NORBERT VAN HEERWAARDEN (NORWATCH PTY-LTD)	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J H SMITH	
<b>DATE OF ORDER</b>	FRIDAY, 19 MARCH 2004	
<b>FILE NO.</b>	APPLICATION 1525 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10930	

<b>Catchwords</b>	Interlocutory Applications ss 26, 29(1)(b), 32 and 32A of the <i>Industrial Relations Act 1979</i> (WA).
<b>Result</b>	Application to substitute the name of the Respondent granted. Order made declaring the Commission does have jurisdiction to hear and determine the Application under s 29(1)(b)(i) and (ii). Application for the Commission as presently constituted to disqualify itself from exercising arbitration functions dismissed. Applicant for costs dismissed.
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Mr D Smith (of counsel)
<b>Ron Watts Investments Pty Ltd</b>	Mr R Watts

*Order*

HAVING heard Mr M Watts on behalf of the Applicant and Mr D Smith on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby –

THAT the name of the Respondent be deleted and that be substituted therefor the name, Norwatch Pty Ltd and Ron Watts Investments Pty Ltd trading as Capel Marron;

DECLARE that the Commission does have jurisdiction to hear and determine the Applicant's application under s 29(1)(b)(i) and (ii) of the Act;

THAT the application for the Commission as presently constituted to disqualify itself from exercising arbitration functions be dismissed;

THAT the Respondent's Application for costs be dismissed.

[L.S.]

(Sgd.) J H SMITH,  
Commissioner.

## SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Adam Bartucciutto, Maria Edmed	Jacob Chacko, Redwood Corp Pty Ltd	1900/2003	Wood C	Discontinued
Alan Britten	Claire Girdler Director CCNL Pty Ltd t/as Civic Video Mayland	1695/2003	Wood C	Discontinued
Alan Joseph Brunskill	Tom Price Engineering	1516/2003	Kenner C	Discontinued
Alan Michael Hudson	Kununurra Region Economic Aboriginal Corporation	1466/2003	Kenner C	Discontinued

Parties		File Number	Commissioner	Result
Andrea Gray	Silviculture Management Pty Ltd	1376/2003	Kenner C	Granted
Andrew Keith Lunn	Lensar P/L T/A Oilfield & Transport Services	1530/2003	Wood C	Dismissed
Anita Karren Sampey	Swan View Delivery Round, RW & BA Brown	1761/2003	Gregor C	Discontinued
Anthony Edward Sargison	Mandurah Crane Hire	1915/2003	Gregor C	Discontinued
Anthony Pagana	Steel-Line Garage Doors	1849/2003	Kenner C	Discontinued
Arie DeVries	Ausland Holding Pty Ltd	1356/2003	Gregor C	Discontinued
Barry George Lyon	Tasman Oil Tools Pty Ltd	112/2004	Kenner C	Discontinued
Blair David Robinson	Hungry Jack's Pty Ltd	74/2004	Wood C	Discontinued
Bridget Anne McBeth	Prime Recruitment	259/2004	Gregor C	Discontinued
Chris Donald Lobban	Clearwater Pty Ltd t/as Superstars and Legends	1509/2003	Kenner C	Discontinued
Christopher Streeter	Kayedar Pty Ltd	1592/2003	Wood C	Discontinued
Clare Louise Ward	Lionel Samson & Sons	202/2004	Gregor C	Discontinued
Clint Irwin Gibson	Atlas Steels (Australia) Pty Limited (ACN 004 496 128)	191/2004	Kenner C	Discontinued
Colleen Anne Griffith	Angus James Real Estate	219/2004	Coleman CC	Discontinued
Corey Alan Rogers	Easystart Investments	172/2004	Gregor C	Discontinued
Dale Ian Annakin	Chemform	1853/2003	Coleman CC	Discontinued
David Leith Moylan	The City of South Perth Council	1764/2003	Kenner C	Dismissed
David Reginald Lock	B & C Sorgiavanni	1847/2003	Gregor C	Discontinued
David William Wright	Rene' Van Boxtel	1916/2003	Wood C	Discontinued
Dean Parker	Conbern Pty Ltd T/A Easymix	159/2004	Scott C	Discontinued
Dennis John Enright	Sleepeeze Bedding Australia Pty Ltd	1733/2003	Beech SC	Discontinued
Dennis Keith Ruthven	Angus James Real Estate Pty Ltd	205/2004	Coleman CC	Discontinued
Desiree Leia-Maree Swainston	Rodella's Fish & Chips	134/2004	Wood C	Discontinued
Diana Lee Maher	Gabelle Pty Ltd as trustee for the Gabelle Service trust (Service Trust to Minter Ellison Lawyers)	1713/2003	Kenner C	Discontinued
Douglas Kinsman	Cornerstone Cartage Contractors	1703/2003	Gregor C	Discontinued
Emma Jayne Mallyon	Hungry Jack's Pty Ltd	98/2004	Gregor C	Discontinued
Emma Mellor	Pioneer Water Tanks (Australia 94) Pty Ltd	155/2004	Kenner C	Discontinued
Eric Schmidt	Legend Boat Builders	1758/2003	Wood C	Discontinued
Faye Sandra Halma	Old Valley Pty Ltd	1887/2003	Kenner C	Discontinued
Federico Molina	Detail Cleaning Services	1167/2003	Kenner C	Discontinued
Graeme Pember	Jamel Industries	1909/2003	Gregor C	Discontinued
Jacquelyn Collins	Women's Law Centre of WA (Inc)	214/2004	Wood C	Discontinued
Jeffrey Ernest Dibb	Aussie Air (Australia) Pty Ltd	245/2004	Coleman CC	Discontinued
Jeffrey Scott Warren	Schultz Partners Pty Ltd	1740/2003	Kenner C	Discontinued
Jennifer Taft	Brennan Sloan	1701/2003	Beech SC	Discontinued
Joanne Powell	Snow White Fabricare	452/2003	Kenner C	Discontinued
Jodee Webb	Tabatha's Holdings / Tabatha's Ella Bache	1073/2003	Wood C	Discontinued
John Paul Volkofsky	Clough Engineering Limited	697/2003	Harrison C	Discontinued
Julia Ann Marie Mastrantonio	Megagem Enterprises Pty Ltd	1621/2003	Gregor C	Discontinued
Julie Grigo	Truckworld	267/2004	Coleman CC	Discontinued
Kathleen Jessie Lulham	Baseway Pty Ltd T/A Red Sands Tavern	1000/2003	Gregor C	Discontinued
Kerri Deanne Tynan	F.A.L/Action Supermarket	26/2004	Gregor C	Discontinued
Kim Lesley Hubbard	Femsure Hygiene Systems	1432/2003	Wood C	Discontinued

Parties		File Number	Commissioner	Result
Kirby Ryalls	Jet Express Travel	534/2003	Coleman CC	Discontinued
Lewis Nannup	Cooks Construction	116/2003	Coleman CC	Discontinued
Linda Janine Jamieson	Suzanne Patricia Strapp Director of Redoak Investments T/As South West Audiology and Hearing Services	1192/2003	Wood C	Discontinued
Lorna Burns	Italian Aged Care (Inc).	60/2004	Gregor C	Discontinued
Louise Elizabeth Taylor	Bryn Allwood Automotives	160/2004	Kenner C	Discontinued
Lynne Game-Bowker	Silver Chain Nursing Association (Incorporated)	1126/2003	Gregor C	Discontinued
Marcus Derek Richards	Imperial Tobacco Australia Limited (ABN 46 088 148 681)	1335/2003	Wood C	Dismissed
Margaret Lesley Venables	ACK Pty Ltd t/as Belrose Care	1600/2003	Kenner C	Discontinued
Maria Russe-Battagliolo	Smorgasbord Products	107/2004	Coleman CC	Discontinued
Mark Gary Frank Laval	Anil Kumar, Roofmart WA	829/2003	Wood C	Discontinued
Mark Leslie Jordan	Lakewood Logistics Group	1941/2003	Gregor C	Discontinued
Mary Josephine Martin	W.H Smith & Co Pty Ltd (ACN 008 987 023)	1586/2003	Wood C	Discontinued
Michael John Windsor	MacMahon Contractors Pty Ltd	117/2004	Beech SC	Discontinued
Michael Noel Watson	Ms L Par De Lio and Mr P Roucco T/A Kissklub Holidays	1940/2003	Gregor C	Discontinued
Michael Slater	The Which Company Pty Ltd	170/2003	Kenner C	Dismissed
Michelle Nicole Dorbert	Crabtree & Evelyn Australia Pty Ltd	58/2004	Kenner C	Discontinued
Mohamed Mohamednur Yacout	Kailis and France Foods Pty Ltd	871/2003	Beech SC	Dismissed
Nevin Robert Eastman	Australian Protective Services Pty Ltd	1084/2003	Kenner C	Discontinued
Nicole Louise Johnson	Captain Choppers Pty Ltd t/as Red Dot Stores	1700/2003	Beech SC	Discontinued
Nora Gauld Whyte	Mary-Anne Kenworthy Image International	1803/2002	Kenner C	Discontinued
Nuria Truslove	Unique (WA) Pty Ltd	1241/2003	Kenner C	Discontinued
Patricia Betty Barron	Cepo Systems Pty Ltd	1716/2003	Kenner C	Discontinued
Patrick Hamer	Motorone Group P/L, Worldmark P/L	1210/2003	Kenner C	Discontinued
Paul Van Saarloos	The Lions Eye Institute of Western Australia (inc)	404/2001	Harrison C	Discontinued
Peter Ian Buzzard	Broadcast Engineering Services (Australia) Pty Ltd	833/2003	Wood C	Discontinued
Raymond Michael Neasmith	BP Roadhouse	1750/2003	Wood C	Discontinued
Rhonda Ann Richardson	Kalbarri Motor Hotel	1496/2003	Smith C	Dismissed
Robert Cassam Bahemia	Termipest	1824/2003	Coleman CC	Discontinued
Robert William Nicholls	Orion WA Pty Ltd	82/2004	Wood C	Discontinued
Ronald Alec Stenning	Sea Corp Pty Ltd	1913/2003	Coleman CC	Discontinued
Ronald Gerard Pinto	Clearview Security	281/2004	Coleman CC	Discontinued
Ronald Raymond Spiteri	Atlas Group Pty Ltd	61/2004	Wood C	Discontinued
Samantha Jean Ovenden	WA Country Health Services	1577/2003	Smith C	Discontinued
Shane Andrew Cartwright	Sanford Management Services Pty Ltd	1896/2003	Coleman CC	Discontinued
Shannon Ivey	Boulevarde Interiors Pty Ltd	257/2004	Kenner C	Discontinued
Shorelle Hayman	Westcoast Media Pty Ltd	1746/2003	Gregor C	Discontinued

Parties		File Number	Commissioner	Result
Stephen Kelleher	Mr John Tuckey "Mitre 10" Tuckeys Hardware Pinjarra	1919/2003	Beech SC	Discontinued
Stephen Mark Babinall	Australian Fast Foods Pty Ltd	1323/2003	Wood C	Discontinued
Stephen Sean Kane	Kwik & Swift Co Pty Ltd atf NWG Trust	1248/2003	Wood C	Granted
Stuart Seymore Harris	Langer Auto Holdings	59/2004	Gregor C	Discontinued
Susan Lawson	Ambit Engineering (WA)	182/2004	Coleman CC	Discontinued
Suzanne Biles	Gosnells Golf Club (Inc)	1005/2003	Harrison C	Discontinued
Tony Vidovich	Southern Horticulture	1762/2003	Wood C	Discontinued
Trevor Smith	Wattyl Australia Pty Ltd	799/2003	Gregor C	Discontinued
Troy Anthony Newhill	Bob Green	1445/2003	Kenner C	Discontinued
Troy Gater	Saybolt Australasia Pty Ltd	1675/2003	Scott C	Discontinued
Wayne Anthony Walker	Transitions, part of Toll Logistics, a division of Toll Transport Pty Limited	1673/2003	Kenner C	Discontinued
William Sandall	Albany Worklink Inc.	33/2004	Scott C	Discontinued

## CONFERENCES—Matters arising out of—

2003 WAIRC 08510

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA

**APPLICANT**

-v-

BHP BILLITON IRON ORE PTY LTD

**RESPONDENT**

**CORAM**

COMMISSIONER S J KENNER

**DATE**

THURSDAY, 19 JUNE 2003

**FILE NO/S**

C 119 OF 2003

**CITATION NO.**

2003 WAIRC 08510

**Result**

Suggestion issued

**Representation**

**Applicant**

Mr J Murie

**Respondent**

Mr R Lilburne of counsel

SUGGESTION

WHEREAS on 6 June 2003 the applicant applied to the Commission for a conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 19 June 2003 the Commission convened a conference between the parties pursuant to s 44 Act;

AND WHEREAS at the conference the Commission was informed that the applicant and the respondent are in dispute in relation to benefits and entitlements for five shift electricians who attended a five day training session in February 2003 by reason of their transfer from shift work to day work pursuant to cl 11(7)(c) of the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 ("the Award");

AND WHEREAS the applicant informed the Commission that in its view, the five shift electricians concerned were treated detrimentally in circumstances where they ought to have been paid as if they remained rostered shift employees in terms of remuneration and days off accordingly;

AND WHEREAS the respondent informed the Commission that it originally intended to so treat the five shift electricians concerned however by reason of their inability to reach agreement as to days off it invoked the terms of cl 11(7)(c) of the Award to transfer the employees to day work for the duration of the training course;

AND WHEREAS the Commission, in an endeavour to assist the parties in a resolution of the dispute, made certain suggestions to the parties and agreed to commit those suggestions to writing;

NOW THEREFORE the Commission, having regard for the interest of the parties directly involved and to prevent the deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Act hereby suggests –

- (1) THAT the parties confer in relation to the method and manner by which training arrangements are to be implemented at site level within 14 days.
- (2) THAT on a without prejudice basis the respondent, for the purposes of resolving the present dispute, treat the five shift electricians as if they had remained on shift for the purposes of attending the five day training course in February 2003 with adjustments to be made for any payments already received by the employees concerned.
- (3) THAT the parties report back to the Commission the result of their discussions after the conclusion of the period in para 1.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.**2004 WAIRC 11111**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v-	
	BURSWOOD RESORT (MANAGEMENT) LIMITED, BURSWOOD HOTEL PTY LTD AND BURSWOOD CATERING AND ENTERTAINMENT PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE OF ORDER</b>	TUESDAY, 13 APRIL 2004	
<b>FILE NO/S</b>	C 11 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11111	

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<b>Result</b>	Interim order issued.
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*Order*

WHEREAS on 30 March 2004 the applicant applied to the Commission for an urgent conference pursuant to Section 44 of the *Industrial Relations Act 1979* ("the Act"); and

WHEREAS the Commission convened a conference on 1 April 2004 and was informed by the applicant that Antony Allis, a member of the applicant union, is to be made redundant by Burswood Hotel Pty Ltd ("BHPL") on 13 April 2004 and that Mr Allis has been offered a Valet Car Park Attendant position with Burswood Resort (Management) Limited ("BRML") from 14 April 2004 conditional upon Mr Allis signing an Australian Workplace Agreement ("AWA"); and

WHEREAS the applicant advised the Commission that Mr Allis did not wish to take up the Valet Car Park Attendant position and be covered by the terms and conditions of an AWA; and

WHEREAS the respondent confirmed that Mr Allis is to be made redundant on 13 April 2004 and that in effect Mr Allis had applied for a new position with BRML and this position is covered by an AWA; and

WHEREAS no agreement could be reached between the parties in relation to the matters in dispute; and

WHEREAS it was agreed at the conference that the matter was to be referred for hearing and determination expeditiously given Mr Allis' employment was to come to an end on 13 April 2004 if he did not accept the position with BRML; and

WHEREAS the parties were given notice on 1 April 2004 that the issue in dispute would be dealt with by 13 April 2004 and there was no objection from the applicant or the respondent to the proposed timeframe; and

WHEREAS on 6 April 2004 the respondent requested by email that the hearing of the matter be deferred to allow the parties to properly prepare for the hearing; and

WHEREAS on 7 April 2004 the applicant emailed the Commission advising its concern with the timetable being varied as Mr Allis' employment contract is to be terminated on 13 April 2004 and requested an undertaking from BHPL that Mr Allis remain employed by BHPL until the matter in dispute was determined; and

WHEREAS on 8 April 2004 the respondents advised the Commission that the undertaking sought by the applicant would not be given as Mr Allis had been aware since 3 March 2004 of the AWA being a pre-condition of the position offered to him with BRML; and

WHEREAS the Commission set the matter down for an urgent conference on 8 April 2004; and

WHEREAS at the conference on 8 April 2004 the applicant advised the Commission it was ready to proceed to hearing under the existing timeframe as indicated at the conference on 1 April 2004; and

WHEREAS the respondent continued to maintain that the existing timeframe was unfair and that the hearing could take up to two days; and

WHEREAS having heard from the parties in relation to deferring the hearing in respect to this matter the Commission reluctantly agreed to the hearing which was to take place on 13 April 2004 being vacated; and

WHEREAS the applicant put the Commission on notice that if the hearing was to be deferred then it would make application for an interim order continuing Mr Allis' employment at Burswood Resort after 13 April 2004 and for him to be subject to the terms and conditions of the relevant award for the Valet Car Park Attendant position pending the hearing and determination of all issues relating to Mr Allis' ongoing employment with BHPL and BRML and the Commission heard from the parties as to whether or not an interim order should issue; and

WHEREAS the applicant argues that the following factors are relevant in support of the issuance of an interim order:

- a) Sections 44(6)(ba)(i) and (ii) and 44(6)(bb)(i) of the Act gives the Commission the power to make the order sought.
- b) Mr Allis' situation was discussed with BRML during March 2004 and it was not until 29 March 2004 that Mr Allis was finally informed that he would be terminated on 13 April 2004 if he did not accept the Valet Car Part Attendant position on BRML's terms.
- c) Mr Allis is qualified and ready, willing and able to perform the duties as a Valet Car Park Attendant.
- d) This position is currently vacant.
- e) BHPL made it clear to Mr Allis that every effort would be made to redeploy all employees to jobs with the parties to this application if an employee did not take up a position at the Customer Contact Centre.
- f) Mr Allis has a right to continue his employment at Burswood Resort without signing an AWA.
- g) Mr Allis will suffer a detriment if the interim order is not granted as he will be terminated on 13 April 2004 and will therefore experience financial difficulties in supporting himself and his family.
- h) Mr Allis is a long term employee of BHPL with eight years' service and has had no performance problems.
- i) If Mr Allis does not take up the position of Valet Car Park Attendant it may be allocated to another employee; and

WHEREAS the Commission was informed by the respondent that there were a number of reasons why an interim order should not issue:

- a) The applicant has not prosecuted Mr Allis' claim expeditiously as Mr Allis was offered the Valet Car Park Attendant position on 3 March 2004 and accepted it on 8 March 2004.
- b) Mr Allis had the opportunity to apply for a Customer Contact Centre position but chose not to.
- c) There is no breach of the *Workplace Relations Act 1996* in offering a new employee a position with the requirement of signing an AWA.
- d) Mr Allis is entitled to a redundancy payment if he is terminated on 13 April 2004.
- e) There is a disadvantage to BRML if it is required to employ Mr Allis under the relevant award as this is not BRML's preferred industrial instrument.
- f) If Mr Allis is terminated on 13 April 2004 he can seek redress under the Act for monetary loss if his claim is successful.
- g) The applicant has not demonstrated that under the terms of s44 of the Act that the Commission should issue an interim order; and

WHEREAS the Commission is of the view that it has jurisdiction to issue an interim order pursuant to s44 of the Act, in particular under s44(6)(bb)(i), which enables the Commission to issue orders which the Commission considers appropriate in the circumstances pending the resolution of a claim; and

WHEREAS taking into account the terms of the Act and in particular s44(6)(bb)(i) of the Act whereby the Commission has the power to give such directions and make such orders that the Commission thinks appropriate in the circumstances pending resolution of the claim; and

WHEREAS the Commission has formed the view that an interim order should be considered pending arbitration of the issues in dispute as Mr Allis will be terminated on 13 April 2004 and the position of Valet Car Park Attendant will no longer be available to him after 13 April 2004; and

WHEREAS when applying the tests of whether or not an interim order should issue the Commission has formed the view that the detriment to Mr Allis is greater than the detriment to the respondents if an order does not issue, that there is a substantial issue to be tried and there is a prima facie case for relief if the applicant is able to demonstrate its case at hearing. Even though this issue was raised three weeks after Mr Allis was offered the position of Valet Car Park Attendant I accept that discussions between the parties occurred to resolve the issue prior to 29 March 2004 and that this application was lodged expeditiously after it was made clear to the applicant and Mr Allis that this dispute could not be resolved. The Commission is also of the view that the consequences of issuing an interim order are not irreversible;

NOW THEREFORE the Commission having formed the view that in the circumstances an interim order is necessary to retain Mr Allis as an employee of BHPL pending the resolution of this issue, and pursuant to the powers conferred on it under the Act and in particular s44(6), hereby orders:

- 1) THAT on an interim basis BHPL continue to employ Mr Allis on a full-time basis under his existing terms and conditions of employment undertaking Valet Car Park Attendant duties as contemplated under the Valet Car Park Attendant job offered by BRML to Mr Allis on 3 March 2004 pending the outcome of arbitration in relation to this matter.
- 2) THAT liberty to apply is reserved to the parties in relation to this order.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

**CONFERENCES—Matters referred—****2003 WAIRC 08458**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS	<b>APPLICANTS</b>
	-v-	
	BHP BILLITON IRON ORE PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 30 MAY 2003	
<b>FILE NO/S</b>	CR 110 OF 2002	
<b>CITATION NO.</b>	2003 WAIRC 08458	

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<b>Catchwords</b>	Practice and procedure – Discovery inspection and production of documents – Relevant principles – Orders made – <i>Industrial Relations Act (WA) 1979 ss 27(1)(o)</i>
<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicants</b>	Mr M Llewellyn
<b>Respondent</b>	Mr A Lucev of counsel

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*Reasons for Decision*

1. This matter was listed for mention by the Commission on 22 May 2003. The mention was listed by reason of an application filed by the applicants on 7 May 2003, seeking discovery of various documents by the respondent. Correspondence from the applicants to the solicitors for the respondent, dated 7 May 2003, requested discovery of the documents particularised in the notice of application, if nothing was heard within seven days. By letter dated 14 May 2003, the respondent's solicitors wrote to the representative of the applicants, raising the issue of delay in bringing the application for discovery since the substantive application was last before the Commission. Furthermore, the respondent foreshadowed the seeking of orders also, for the discovery of various documents and classes of documents. The solicitors for the respondent also foreshadowed raising the issue as to whether the substantive application should proceed at all, given the period of time that the employees have been working on the rearranged shift patterns.

**Delay**

2. It is the case that the applicants' application for discovery was not filed for some months following the matter last being before the Commission. At the conclusion of the hearing on 20 December 2002, the substantive application was adjourned, because of difficulties which had arisen in relation to discovery of documents. The Commission indicated to the parties at that time, that the question of documents needed to be put on a proper footing, in light of all of the issues raised in the proceedings, before further evidence should be led and the case completed. It was anticipated that this would promptly occur, following the adjournment of the substantive proceedings. Be that as it may, the application was not brought until 7 May 2003.
3. Despite there being a substantial delay in bringing the application, the Commission is satisfied that the content of the application for discovery has been the subject of previous request, and moreover, in light of the respondent's requests also, in the interest of the just determination and the proper conduct of the matter generally, it is not minded to exercise its discretion to dismiss the application pursuant to s 27(1)(a) of the Industrial Relations Act 1979 ("the Act").

**Consideration**

4. The principles relevant to discovery, production and inspection in this jurisdiction are well known. I merely refer to the decision of the Full Bench of this Commission in *ALHMCWU v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801 and of the Commission as presently constituted in *Ellis v The Grand Lodge of WA of Antient Free and Accepted Masons Incorporated & Others* (1999) 79 WAIG 1723. I apply those principles for the purposes of this matter.

**Applicants' Claims**

5. The applicants' claims are set out at paras 1 to 6 of the schedule to the notice of application. It was submitted by Mr Llewellyn that the content of those requests are relevant to the matters that have been referred for hearing and determination pursuant to s 44(9) of the Act. Those matters include allegations that employees, who were the subject of transfer from one shift to another, were so transferred by reason of their chosen form of industrial regulation. Additionally, is the issue of detriment by reason of disruption to employees' social and domestic arrangements. It is also relevant to observe, that the respondent's case in terms of the referral, is that the shift change was necessary to implement efficiencies in its operations and to also eliminate friction between award and workplace agreement employees, working on the same shift pattern. It is immediately apparent from the terms of the re-amended schedule of matters referred, that the issues that are being agitated before the Commission are broad, self evidently and as illustrated by some of the evidence led thus far. It is within that context that I consider the terms of the documents sought.
6. In my opinion, all of the categories of documents set out in the schedule to the applicants' notice of application could relevantly lead to a train of inquiry in relation to the issues to be determined by the Commission. In that context, I am satisfied, not without some oscillation in terms of the delay in bringing the application itself, that an order for discovery would be just.
7. As to paras 1 and 2, somewhat obviously, the relevant period should be 2002. Likewise, for para 3, in terms of notes, the period should be 2002.

8. In relation to the request for documents in para 4, the Commission was informed that these documents are available in electronic form. In the event that GOIC system records prove to be too onerous to produce by the respondent, application can be made to vary the terms of the Commission's order.
9. In relation to para 6, the Commission confines the category of documents to which that request refers, to only the dairy of Mr Lohse.

#### Respondent's Requests

10. The Commission has considered carefully the content of the respondent's request for production of documents set out at paras 1 to 14 in the letter from the respondent's solicitors dated 14 May 2003. In my opinion, the content of those requests in some respects, are well outside of what the Commission considers to be documents that could reasonably be said that could lead to a train of inquiry in relation to the specific allegations made in the matter referred. In particular, I am not persuaded that documents referred to in paras 1 to 4, as broad as they are, bear upon the issues to be determined in these proceedings, connected to the question of shift transfers. They appear to me to relate far more broadly to almost any issue associated with the introduction of individual employment arrangements, since in or about November 1999. Those requests in my view are oppressive and unnecessary for the purposes of determining these proceedings.
11. However, I am of the view that those categories of documents, to the extent that they exist and are within the applicants' possession, custody or power, in relation to allegations of intimidation, harassment, discrimination, and the respondent's shift transfer proposal, should be discovered. That is, any or all documents falling within that description of the categories described in paras 1 to 4, in my opinion, so confined, would be properly relevant to issues arising in the proceedings and ought to be produced for inspection. In my opinion also, para 5 of the respondent's request is clearly relevant. As to the categories of documents in paras 6 to 14, in my view, as to para 6, it is only those documents relating to the issues outlined above, that should be produced. That is, documents of that kind, in relation to allegations of intimidation, harassment, discrimination and the shift reorganisation proposal. As to the categories of documents referred to in para 7, those documents are in my opinion relevant to the issues raised in para 6 of the re-amended schedule to the memorandum of matters referred for hearing and determination.
12. The categories of documents in paras 8 to 14, are in my view, clearly relevant to the matters in issue and to the extent that such documents have not been produced thus far, then they should be. The only exception to this is the category referred to in para 11. It is only documents of that kind there referred to, again, relating to allegations of intimidation, harassment and discrimination and the particular shift reorganisation proposal, that would be appropriate to be discovered for inspection.
13. Again, as with the respondent, if difficulties arise in compliance with the terms of the order to issue, the matter can be re-listed on application.
14. In light of the orders the Commission now proposes to make, I have very considerable reservations as to the efficient and orderly disposition of the proceedings presently listed for mid June 2003. The Commission must, pursuant to s 26(1)(c) of the Act, consider not only the interests of the parties immediately concerned, but also that of the community. Thus, the Commission has decided to vacate the hearing dates presently listed, in the interests of putting these proceedings on a proper footing, with further listings to be considered in July 2003.
15. In the circumstances, the Commission will require compliance with the order for discovery by 13 June 2003.
16. A minute of proposed order will issue shortly.

2003 WAIRC 08457

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS	<b>APPLICANTS</b>
	-v-	
	BHP BILLITON IRON ORE PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 6 JUNE 2003	
<b>FILE NO/S</b>	CR 110 OF 2002	
<b>CITATION NO.</b>	2003 WAIRC 08457	
<hr/>		
<b>Result</b>	Order issued	
<b>Representation</b>		
<b>Applicant</b>	Mr M Llewellyn	
<b>Respondent</b>	Mr A Lucev of counsel	
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#### *Order*

HAVING heard Mr M Llewellyn on behalf of the applicants and Mr A Lucev of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

- (1) THAT the respondent shall give an informal discovery of the documents and classes of documents, unexpurgated, in its possession, custody or power as set out in the schedule to the applicants' notice of application of 7 May 2003 concerning the mine production department at Newman by 13 June 2003 as follows:
  - (a) paras 1 and 2, whereby the relevant period is 2002;
  - (b) para 3, whereby the relevant period in terms of notes is 2002;

- (c) para 4;
  - (d) para 5; and
  - (e) para 6, whereby the category of documents is confined to the diary of Mr Lohse.
- (2) THAT the applicants shall give an informal discovery of the documents and classes of documents, unexpurgated, in their possession, custody or power as set out in the letter from the respondent's solicitors to the applicants' representative of 14 May 2003 concerning the mine production department at Newman by 13 June 2003:
- (a) paras 1 to 4, and 6, insofar as they relate to allegations of intimidation, harassment, discrimination, and the respondent's shift transfer proposal where the relevant period is 11 November 1999 to date;
  - (b) paras 5 and 7, 8 to 10 and 12 to 14; and
  - (c) para 11 where the relevant period is 2002.
- (3) THAT inspection shall be completed by 20 June 2003.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.**2003 WAIRC 08568**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS	<b>APPLICANTS</b>
	-v- BHP BILLITON IRON ORE PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 27 JUNE 2003	
<b>FILE NO/S</b>	CR 110 OF 2002	
<b>CITATION NO.</b>	2003 WAIRC 08568	

<b>Catchwords</b>	Practice and procedure – Discovery inspection and production of documents – Relevant principles – Further and better discovery – Enforcement and interpretation of orders - No orders made – <i>Industrial Relations Act (WA) 1979 s 27(1)(o);s 46; s 83</i>
<b>Result</b>	
<b>Representation</b>	
<b>Applicants</b>	Mr M Llewellyn
<b>Respondent</b>	Mr A Lucev of counsel and Mr R Kelly of counsel

*Reasons for Decision*

- 1 On 30 May 2003 the Commission published its reasons for decision in relation to applications by the applicants and respondent, for discovery and inspection of documents: (unreported 2003 WAIRC 08458) ("the Order"). The Order was perfected and deposited in the office of the Registrar on 10 June 2003.
- 2 By letter dated 20 June 2003 the solicitors for the respondent requested the re-listing of this matter, on the grounds that "the applicants are refusing to provide discovery of the unexpurgated material set out in the Order". An issue was also raised as to whom would be inspecting documents produced in accordance with the Order.
- 3 Accordingly, the Commission re-listed this matter on 26 June 2003. At the proceedings, counsel for the respondent, Mr Lucev, made a number of submissions. Mr Lucev submitted that the respondent sought directions and/or a variation to the Order on a number of bases. First it was submitted that the applicants had failed to provide unexpurgated copies of documents said to be caught by the Order, in particular as the Commission understands it, diaries of Messrs Cumbers, Kumeroa and Brewer. Apparently, extracts relating to the herein proceedings, have been provided to the respondent, but not the entire diaries. Secondly, Mr Lucev raised the issue of a diary(s) said to be in the possession of an official of the AWU, Mr Tracey, said to contain matters relevant to the substantive proceedings. Thirdly, an issue has arisen as to who may inspect relevant documents. Apparently, both the applicants and the respondent's solicitors had purported to specify whom may inspect documents, discovered in accordance with the Order. A variation to the Order is therefore sought, to clarify the position.
- 4 For the applicants, Mr Llewellyn opposed the issuing of any directions and/or variation to the Order. He submitted that in terms of the diaries for Messrs Cumbers, Kumeroa and Brewer, none of those persons have worked on either C or D shift and are not otherwise covered by the Order. In relation to the diary(s) of Mr Tracey, Mr Llewellyn submitted that likewise, such request is not covered by the Order, but however, as with the provision of extracts from the diaries of Messrs Cumbers, Kumeroa and Brewer, the applicants' are prepared to provide a copy of Mr Tracey's notebook or some such document, which apparently exists, which deals only with the industrial affairs of the respondent.

**Consideration**

- 5 Firstly, I deal with the question of inspection of documents. The Order is one issued by the Commission inter partes. It is the parties to the Order, that is, the applicants and all of them, and the respondent, who are obliged to give discovery of the documents described in the Order and who have a right, by the Order, to inspect those documents. The right of inspection of course, also includes the parties' solicitors and/or agents, instructed to represent and appear for those parties in the proceedings, in the usual manner. It is not for the parties to determine any limitations on the right of inspection. The question of inspection, and the rights conferred, is a matter for the Commission and in this case, is plain from the terms of the Order. Any purported restriction sought to be imposed by any party, is a breach of the Order. The Commission trusts that it will be unnecessary to raise such a matter on any future occasion.

- 6 In relation to the further relief sought in these proceedings, the Order having been perfected and deposited in the office of the Registrar, the Commission is functus officio in relation to it. That is, there is no further function for the Commission to perform, in relation to the Order: *AEEFEU and Other v Building Management Authority* (1995) 75 WAIG 2483. Furthermore, the Order is not a general order for discovery and inspection, but rather, is an order for specific discovery and inspection of specified documents and classes of documents, and must be read with the terms of the notice of application in the case of the applicants' requests, and the respondent's letter of request dated 14 May 2003, in terms of the respondent's requests. In my view, the Order is plain in its terms and speaks for itself. It is not appropriate in my opinion, for the Commission to deal with in the context of the present application, whether certain documents do or do not fall within the scope of the Order. That is either a matter for enforcement pursuant to s 83 of the Act, or perhaps, for interpretation pursuant to s 46 of the Act.
- 7 As to the seeking of a direction that the Order is complied with, the Commission is not prepared to consider such a remedy. Orders issued by the Commission are to be complied with, and it is not for the Commission in my opinion, to issue further orders or directions, requiring a party to comply with an existing legal obligation. Other steps are open in an appropriate case, such as the issuance of an order in the nature of a springing order, in the face of non-compliance by a party. That however, does not arise in this matter.
- 8 As to any further orders for discovery and inspection, or a variation to the Order, whether or not the documents sought are presently caught by the Order is in dispute. There was and is no evidence, either by affidavit or otherwise, as to the nature of such documents and it is for the party seeking further and better discovery, to deal with such an issue: (See generally Seaman *Civil Procedure Western Australia* para 26.6.1 and following). I am of the opinion that absent the resolution of that dispute, it would be very difficult for the Commission to deal with the matter, in any event.
- 9 In all of the circumstances, and in light of what is presently before the Commission, I am not inclined to make any further directions or orders in relation to these matters, at this stage.

2003 WAIRC 08663

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS &amp; OTHERS

**APPLICANTS**

-v-

BHP BILLITON IRON ORE PTY LTD

**RESPONDENT****CORAM**

COMMISSIONER S J KENNER

**DATE**

WEDNESDAY, 9 JULY 2003

**FILE NO/S**

CR 110 OF 2002

**CITATION NO.**

2003 WAIRC 08663

**Result**

Order issued

**Representation****Applicant**

Mr M Llewellyn

**Respondent**

Mr A Lucev of counsel and Mr R Kelly of counsel

*Order*

HAVING heard Mr M Llewellyn on behalf of the applicants and Mr A Lucev of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

1. THAT in the interests of the parties and the public interest the hearing of the herein application be and is hereby adjourned.
2. THAT the hearing dates listed for 15 to 18 and 21 to 25 July 2003 be and are hereby vacated.
3. THAT the herein application be listed on dates to be fixed preferably in late August or early September 2003.
4. THAT the applicants and the respondent report back to the Commission as to the status of discovery and inspection pursuant to the order of the Commission of 6 June 2003 within 14 days of the date of this order.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

2003 WAIRC 09038

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS &amp; OTHERS

**APPLICANTS**

-v-

BHP BILLITON IRON ORE PTY LTD

**RESPONDENT****CORAM**

COMMISSIONER S J KENNER

**DATE**

FRIDAY, 15 AUGUST 2003

**FILE NO/S**

CR 110 OF 2002

**CITATION NO.**

2003 WAIRC 09038

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<b>Catchwords</b>	Practice and procedure – Discovery, inspection and production of documents – Relevant principles – Orders made – <i>Industrial Relations Act 1979</i> (WA) s 27(1)(o), s 27(1)(a)
<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicants</b>	Mr M Llewellyn
<b>Respondent</b>	Mr A Lucev of counsel and Mr R Kelly of counsel

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*Reasons for Decision*

- 1 The Commission made an order dated 9 July 2003, adjourning the substantive application, because of difficulties between the parties in relation to documents. The respondent has now made application that the applicants' claim be dismissed alternatively the Commission refrain from further hearing the substantive application. The ground in support of the application is that it is alleged that the applicants have failed to comply with the Commission's order for discovery and inspection, dated 6 June 2003 ("the Order").
- 2 The Order is to be read with the schedule to the application for discovery and inspection filed by the applicants, and the letter request of the respondent dated 14 May 2003, in respect of the same issues.
- 3 The present application has been made, following inspection of documents which apparently took place on 14 July 2003, at the premises of the respondent's solicitors. In an affidavit filed in support of the present application by the respondent, Mr Kelly, a solicitor employed by Mallesons Stephen Jaques, deposed to the effect that on inspecting documents produced by the applicants, it appeared that a number of documents or categories of documents were incomplete in that only copies of parts thereof, were produced for inspection.
- 4 In particular, the respondent, represented by Mr Lucev of counsel, complained that extracts only, were produced from the work diaries and notebooks of Messrs Brewer, Cumbers and Kumeroa, representatives of the applicant unions.
- 5 As the Commission understood the applicants' submissions, it was put that in the applicants' view, the diaries of Messrs Brewer, Cumbers & Kumeroa or their notebooks however described, did not fall within the terms of request 11 from the respondent's solicitors dated 14 May 2003, in that neither of these persons have worked on C or D shift since the introduction of workplace agreements at the respondent.

**Consideration**

- 6 Having considered the application by the respondent under s 27(1)(a) of the Industrial Relations Act 1979 ("the Act") to dismiss or refrain from hearing the substantive claim, I am not persuaded to this effect. I do not consider the applicants' approach to this matter to constitute a wilful non compliance with the Order.
  - 7 Whilst it may be that Messrs Brewer, Cumbers and Kumeroa have not worked on C or D shift for the purposes of par (c) of the Order applying to the applicants, in my opinion, any notebooks or other materials of this description, possessed by Messrs Brewer, Cumbers and Kumeroa, fall within other categories of documents, contained in the respondent's solicitor's letter of request and are subject to the Order. In my view, any such "spiral notebooks" as described, are "documents". Because of this, their unexpurgated content ought to be produced for inspection.
  - 8 Likewise, in any other cases where extracts only of notebooks and notes have been provided, in my opinion, the entire content of those documents should be produced for inspection, consistent with the terms of the Order.
  - 9 One other matter was raised that is somewhat controversial. That relates to diaries in the possession of Mr Tracey. According to Mr Llewellyn, a document specific to the respondent's operations belonging to Mr Tracey, is already in the possession of the respondent arising from other proceedings. There is some issue as to the release of the respondent from the implied undertaking as to the use of documents obtained in other proceedings. Subject to that requirement, that document would clearly be discoverable.
  - 10 It is any other diaries or notebooks in Mr Tracey's possession, that relate to the affairs of other than the respondent that caused the applicants concern. It was Mr Llewellyn's submission that such documents do not fall within the scope of the Order.
  - 11 The Commission dealt with the relevant and well known principles in relation to discovery and inspection, in its reasons for decision dated 30 May 2003. Suffice to say that it is only documents that relate to the matters in question, that are properly the subject of an obligation to discover. In this sense, relevance to a matter in question, is settled to be not confined to documents which would be evidence on any matter, and also includes those documents which contain information that may directly or indirectly, enable the party in receipt of discovery to advance their own case or to damage the case of the opponent: *The Consul Corfitzon* (1917) AC 550 at 553.
  - 12 In my opinion, applying these principles, documents in the possession, custody or power of Mr Tracey, including any diary or notebook that relate to the affairs of employers other than the respondent, do not meet this test and are not discoverable in my view.
  - 13 The Commission appreciates the sensitivity of this particular matter. Accordingly, in my view, the most appropriate way to deal with this issue is to enable the covering up of those parts of documents in Mr Tracey's possession custody or power, that do not refer to the affairs of the respondent.
  - 14 I do not consider it necessary in all of the circumstances to make an order in the nature of a springing order, as sought by the respondent. Suffice to say, what the Commission has said above should make the position clear.
  - 15 Finally, during the course of the hearing, Mr Llewellyn made a further application for the respondent to give discovery of a range of further documents and that this request not be restricted to the respondent's Newman operations. This application was, apart from documents going to the issue of authorised union representatives, opposed by the respondent on the basis that it is too late and too broad in scope.
  - 16 In my opinion, the application is both late and broad. However, paragraph four of the request is a proper one given the claims and counter-claims and will be granted. In other respects the requests are too broad at this very late stage of the proceedings and suffer the same fate as the scope of a number of the respondent's original requests.
  - 17 An order now issues.
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## 2003 WAIRC 09102

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS

**APPLICANTS**

-v-

BHP BILLITON IRON ORE PTY LTD

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER

**DATE** FRIDAY, 22 AUGUST 2003

**FILE NO/S** CR 110 OF 2002

**CITATION NO.** 2003 WAIRC 09102

**Result** Order issued  
**Representation**  
**Applicants** Mr M Llewellyn  
**Respondent** Mr R Kelly of counsel

*Supplementary Reasons for Decision*

- 1 The Commission published reasons for decision on 15 August 2003, dealing with certain matters raised by the parties concerning the order of the Commission in relation to discovery and inspection of documents made on 6 June 2003 ("the Order"). Following the publishing of minutes of proposed order in connection with those matters, the applicants requested a speaking to the minutes as they are entitled to do pursuant to s 35(3) of the Industrial Relations Act 1979 ("the Act").
- 2 At the speaking to the minutes Mr Llewellyn on behalf of the applicants, raised some matters going to the scope of the proposed order, in particular proposed order 1(a). An issue raised by Mr Llewellyn, was whether the requirements imposed by proposed order 1(a) were to be read as confined to the issues allegations of intimidation, harassment, discrimination, and the respondent's shift transfer proposal, as contained in the Order.
- 3 Further issues were raised in relation to claims of legal professional privilege, or at least claims analogous to that, as applying to lay advocates: *ALHMMWU v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801 at 1808.
- 4 Mr Kelly, counsel for the respondent, submitted that the minutes of proposed order accorded with the Commission's reason for decision and no amendment was necessary.
- 5 In relation to the issue of the scope of the proposed order, raised by Mr Llewellyn, the Commission in its reasons for decision of 15 August 2003, referred to the Order and the letters of request and notice of application in leading to it being made. In so far as the order refers to the obligation on the applicants to discover documents, other than specific work diaries, it is clear from the Order, and the Commission's earlier reasons for decision leading to the making of the Order which were dated 30 May 2003 (2003 WAIRC 08458), that the categories of documents relied on by the respondent to support the further order being made, are expressly limited to allegations of intimidation, harassment, discrimination and the respondent's shift transfer proposal.
- 6 That being so, and given that the application by the respondent for further orders was in that context, then proposed order 1(a) can only extend to that same category of documents and the order to issue will make this clear. It is not the purpose of the Commission's further order to expand the scope of matters in relation to which discovery is to be given. Likewise, the notebook of Mr Tracey referred to in proposed order 1(a). That is, the terms of para 1(a) of the proposed order must be read consistent with the terms of para 2(a) of the Order, which refers to the relevant parts of the letter request dated 14 May 2003, upon which counsel relied for the seeking of further orders for discovery and inspection.
- 7 The Commission emphasises however, that documents in relation to these matters, apart from the specific document of Mr Tracey dealt with in the Commission's reasons of 15 August 2003 are to be unexpurgated. This means that the entire relevant document is to be made available for inspection, such as the complete notebooks of Messrs Kumeroa, Cumbers and Brewer.
- 8 One final matter arises. Mr Llewellyn raised the issue of seeking a date by which the parties are to exchange documents following the inspection process, given the proximity of the re-listing of the hearing dates in this matter to commence on 15 September 2003. Given the history of difficulties with documents in this matter, in my view, it would be prudent and for the benefit of the parties, that there be a finite date for the purposes of the order to issue. Accordingly the parties will be required to exchange documents sought from one another arising from inspection, by no later than 1 September 2003. Obviously, if there are to be claims for privilege in relation to any documents from any of the parties, those claims with particularity, should be identified very promptly.
- 9 An order now issues.

## 2003 WAIRC 09111

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS

**APPLICANTS**

-v-

BHP BILLITON IRON ORE PTY LTD

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER

**DATE** FRIDAY, 22 AUGUST 2003

**FILE NO/S** CR 110 OF 2002

**CITATION NO.** 2003 WAIRC 09111

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicants</b>	Mr M Llewellyn
<b>Respondent</b>	Mr A Lucev of counsel and Mr R Kelly of counsel

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*Order*

HAVING heard Mr M Llewellyn on behalf of the applicants and Mr A Lucev of counsel and with him Mr R Kelly of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

1. THAT the applicants shall produce for inspection by the respondent the following unexpurgated material within seven days of the date of this order:
  - (a) the documents and classes of documents set out in the letters from the applicants' representative to the respondent's representative dated 30 May 2001 (sent on 14 June 2003) and dated 20 June 2003, in relation to allegations of intimidation, harassment, discrimination and the respondent's shift transfer proposal, including but not limited to all spiral notebooks, diary notes and other types of notebooks from which extracts were taken and provided for inspection by the applicants on Monday, 14 July 2003 save that any such diary or notebook belonging to Mr W Tracey is to be discovered only to the extent that it relates to the respondent; and
  - (b) the unexpurgated notebooks of Messrs Brewer, Cumbers and Kumeroa that were produced for inspection by the applicants on Monday, 14 July 2003.
2. THAT the respondent shall produce for inspection by the applicants the following unexpurgated material within seven days of the date of this order:
  - (a) any documents to or from the respondent as to the notification of the appointment, election or otherwise of authorised union representatives of the applicants at the respondent's Newman operations.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

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**2004 WAIRC 10822**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS	<b>APPLICANT</b>
	-v-	
	BHP BILLITON IRON ORE PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 5 MARCH 2004	
<b>FILE NO/S</b>	CR 110 OF 2002	
<b>CITATION NO.</b>	2004 WAIRC 10822	

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr M Llewellyn
<b>Respondent</b>	Mr A Lucev of counsel and Mr R Kelly of counsel

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*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

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2004 WAIRC 11056

**PERMANENCY OF MEMBER**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v-	
	DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT	
<b>DATE OF ORDER</b>	MONDAY, 5 APRIL 2004	
<b>FILE NO</b>	CR 38 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11056	

**Result** Matter divided into two parts

*Order*

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the Industrial Relations Act 1979 and involves the classification of Mr Peter Simmonds and Mr Ken Ninnette; and

WHEREAS this matter was listed for hearing and determination on the 1<sup>st</sup> and 2<sup>nd</sup> days of April 2004; and

WHEREAS at the commencement of the hearing on the 1<sup>st</sup> day of April 2004, the applicant requested that only the matter as it relates to Mr Simmonds be heard and the matter as it relates to Mr Ninnette be adjourned sine die; and

WHEREAS the respondent did not oppose the applicant's request and the Commission granted such request; and

WHEREAS the parties agreed that the matter be divided into two parts in order that the issues relating to Mr Simmonds and Mr Ninnette be dealt with separately;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the matter be divided into two parts, CR 38A of 2004 to deal with Mr Peter Simmonds and CR 38B of 2004 to deal with Mr Ken Ninnette.

(Sgd.) P.E. SCOTT,  
Commissioner.

[L.S.]

2004 WAIRC 11057

**PERMANENCY OF MEMBER**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v-	
	DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT	
<b>DATE OF ORDER</b>	MONDAY, 5 APRIL 2004	
<b>FILE NO</b>	CR 38A OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11057	

**Catchwords** Classification of employee – Whether practice of automatic progression of classification upon completion of qualification – Nature of undertakings given on behalf of employer  
Jurisdiction – Whether order sought constitutes appointment of officer – Commission held to have jurisdiction – *Industrial Relations Act 1979 (WA)* s 23(2a); *Public Sector Management Act 1994 (WA)* s 97(1)(a)

**Result** Respondent to recognise classification

**Representation**

**Applicant** Mr M Swinbourn

**Respondent** Mr R Grigoroff

*Reasons for Decision*

*(Given extemporaneously and edited by the Commissioner)*

1 The matter referred for hearing and determination is as follows:

- “1. The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch (“the Applicant”), on behalf of its members Mr Peter Simmonds and Mr Ken Ninnette, says that:

- (a) Mr Simmonds has been employed by the Department of Conservation and Land Management ("the Respondent") in the position, and performed the duties, of a National Park Ranger for some 8 years;
  - (b) During this period the Respondent gave undertakings to Mr Simmonds that if he attained a Certificate IV in Land Management he would be progressed to the classification of National Park Ranger;
  - (c) The Respondent has failed to progress Mr Simmonds in accordance with the undertakings given to him and in accordance with the established practice in relation to Trainee Rangers;
  - (d) Mr Ninyette commenced work as a Trainee Ranger in June 2001 and subsequently completed a Certificate IV in Land Management;
  - (e) Mr Ninyette's employment has continued to be classified as a Trainee Ranger despite the completion of the requirements of the traineeship, contrary to the established practice in relation to Trainee Rangers;
  - (f) The Respondent failed to advertise the position that Mr Ninyette filled at the time of the completion of his traineeship and has continued to employ Mr Ninyette in this position performing the duties of a Ranger; and
  - (g) The Respondent has failed to correctly recognise the progression of Mr Simmonds and Mr Ninyette to the classification of National Park Ranger under the *Rangers (National Parks) Consolidated Award 2000* ("the Award").
2. The Applicant seeks the following relief:
    - (a) A declaration that the Respondent has failed to correctly recognise the progression of Mr Simmonds and Mr Ninyette to the classification of National Park Ranger under the Award; and
    - (b) An order that the Respondent recognise Mr Simmonds and Mr Ninyette as National Park Rangers under the Award, to take effect from the time that each employee successfully completed the Certificate IV in Land Management, or in the alternative, from the time that each employee formally completed his traineeship.
  3. The Respondent rejects the Applicant's claims and says that:
    - (a) The Commission is precluded from enquiring into or determining the matter because of the exclusion in Section 23(2a) Industrial Relations Act 1979;
    - (b) The Respondent is not obliged to honour an undertaking (if given) that required it act contrary to the Public Sector Management Act 1994; and
    - (c) The Award does not allow for a progression into Ranger positions.
  4. The Respondent denies that the employees are entitled to the relief sought or any relief at all and says that the orders sought require the Commission to act contrary to the Public Sector Standards in Human Resource Management which provide for positions within the Public Sector to be filled through an open merit based selection process."
- 2 The matter, insofar as it relates to Mr Ninyette, has not proceeded today, therefore these Reasons for Decision relate only to Mr Simmonds. I shall deal with the issue of jurisdiction later in these reasons after I have made findings of fact.
  - 3 I have heard the evidence from Murray John Banks, Jayson Maurice Puls, Rory Michael Neal, and Peter Colin Simmonds, for the applicant. I have also heard evidence from Bradbury Francis Commins, the respondent's Operations Manager for the Blackwood region.
  - 4 I note with interest that Mr Commins' evidence includes that relating to the respondent's policies regarding the filling of positions, but he also says that Mr Simmonds has qualifications to be a Ranger and is an excellent employee. I applaud Mr Commins for his objectivity in these circumstances.
  - 5 Having heard the evidence, I make the following findings:
  - 6 Peter Simmonds' situation is somewhat unique. He has been an employee of the respondent since February 1987, first as a forest worker. Since at least 1997, he has undertaken duties of a National Park Ranger at Conto's campsite in the Leeuwin Naturaliste National Park.
  - 7 In 1996, he was issued with an authority card as a Ranger and Conservation and Land Management Officer, and this authority allows him to perform duties of a Ranger including law enforcement. Twelve months ago, he and his wife and four children took up residence in the house owned by the respondent at Conto's campsite where he performs those duties as a Ranger.
  - 8 When he first commenced undertaking Ranger's duties, Mr Simmonds was providing relief in the absence of other Rangers. He now works largely alone at Conto's campsite, and I am satisfied that his duties include at least some which would normally be undertaken by a senior National Park Ranger.
  - 9 During the past few years Mr Simmonds has been referred to as an Acting Ranger, a Trainee Ranger and a Ranger. There is clearly confusion as to his status. Mr Simmonds does not complete the salary records normally completed by Rangers, but fills out the timesheets normally used by AWU maintenance workers. He is paid an AWU award rate plus an amount to take his rate to that of a Ranger in accordance with the appropriate increment.
  - 10 Mr Simmonds has received correspondence which indicates his progression of pay through the Rangers' incremental scale. Mr Simmonds' situation is complicated by his being an Acting Ranger for a number of years. It is clear to me, and I find, that Mr Simmonds has been told, and has had every reason to believe, that upon completion of the TAFE Certificate IV in Land Management he would be reclassified to a Ranger. I have no hesitation in accepting Mr Simmonds' evidence of a conversation with Roger Banks, the then District Manager, that upon completion of that qualification he would become a Ranger.
  - 11 Exhibit 5 is a letter from Mr Banks to Mr Simmonds dated 1 November 1999 and it reads:
 

"Dear Peter,

Further to our recent discussion CALM is very supportive of your desire to become a National Park Ranger.

I will progress your re-classification in a formal manner when you have completed the certificate in Land Management course that is an essential component of the job.

In the interim you should continue with your studies and discussions with TAFE.

In addition I would like you to become a F.E.A. officer on the District Fire Roster this season in an attempt to increase your fire management skills.

..."

- 12 I find that it is appropriate to draw the inference that all that was required when Mr Simmonds had completed his Certificate in Land Management was the formal progression of his classification.
- 13 In February 2000, Mr Banks had congratulated Mr Simmonds in terms which allowed him to conclude that he was formally a Trainee Ranger. The evidence of Mr Banks and Mr Puls and, in particular, Mr Neal, demonstrates that, at least from 1987 until around 2002, there was an automatic progression from Trainee Ranger to Ranger upon satisfactory completion of the TAFE Certificate IV. This is consistent with what has occurred with Mr Simmonds, albeit that the paperwork is less than ideal.
- 14 Mr Simmonds appears to have completed the requirements for being awarded Certificate IV in Conservation and Land Management in around September 1999. However, due to administrative difficulties with TAFE, he was not formally awarded that certificate until 28 February 2002.
- 15 The respondent proposes to advertise the position which it appears it considers Mr Simmonds has been performing since at least 1997, albeit that such a position was not formally created until February 2004. The respondent has taken no action in at least 7 years since Mr Simmonds has been performing the work of a Ranger to formalise the arrangement.
- 16 I distinguish the question before me of Mr Simmonds' appropriate classification to the question of filling the new position.
- 17 I accept Mr Neal's evidence that there is a recognised arrangement for those who commenced traineeships prior to 2002, continuing with that arrangement and being able to progress automatically to the classification of Ranger upon completion of the appropriate qualification. Those who started traineeships after that time need to apply for and be appointed to a position as Ranger upon completion of the qualification. Mr Simmonds has undertaken the training and studies as a Ranger from at least 1999.
- 18 Accordingly, I find that Mr Simmonds was treated for all intents and purposes, as being an Acting Ranger and a Trainee Ranger. He completed the necessary qualifications for progression to the classification of Ranger upon the awarding of a Certificate IV in Conservation and Land Management. The respondent ought to have recognised him as a Ranger from that time.
- 19 I find that Mr Simmonds was a Ranger from at least 28 February 2002 and I intend to order that the respondent accord him the classification of Ranger from that date.
- 20 As to the issue of jurisdiction, this is not a matter relating to the Public Sector Standards. It is not a matter excluded from the Commission's jurisdiction by reference to section 23(2)(a) of the Industrial Relations Act 1979, as it does not relate to any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is or may be prescribed under the Act. It does not relate to the recruitment, selection or appointment of Mr Simmonds as he is already an employee of the respondent. The Arbitrator is simply being asked that Mr Simmonds be given appropriate recognition in terms of his classification and progression.
- 21 It is not a matter of promotion, but a matter of classification.
- 22 Accordingly, the Arbitrator's jurisdiction is not impeded by the Public Sector Management Act 1994.
- 23 An order in respect of Mr Simmonds shall issue in the terms set out in the application.

**2004 WAIRC 11118**

**PERMANENCY OF MEMBER**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v-	
	DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER P E SCOTT	
<b>DATE OF ORDER</b>	TUESDAY, 13 APRIL 2004	
<b>FILE NO</b>	CR 38A OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11118	

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<b>Result</b>	Order issued
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*Order*

HAVING heard Mr M Swinbourn on behalf of the applicant and Mr R Grigoroff on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the respondent shall recognise Peter Colin Simmonds as having obtained the classification of Ranger pursuant to the Rangers (National Parks) Consolidated Award, 2000 (No. A 17 of 1981) from no later than 28 February 2002.

(Sgd.) P.E. SCOTT,  
Commissioner.

[L.S.]

2004 WAIRC 10785

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v- CUDDLES GROUP PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE</b>	WEDNESDAY 3 MARCH 2004	
<b>FILE NO/S</b>	CR 106 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10785	

<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – Summary dismissal – Lack of procedural fairness – Applicant harshly, oppressively and unfairly dismissed – Application upheld – Compensation ordered – <i>Industrial Relations Act 1979</i> (WA) s27(1)(d), s44
<b>Result</b>	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement.
<b>Representation</b>	
<b>Applicant</b>	Mr M Swinbourn
<b>Respondent</b>	No appearance

*Reasons for Decision*

- 1 Ms Jennifer Reynolds was employed by Cuddles Group Pty Ltd (the “respondent”) until she was terminated on 9 May 2003. As a result of her termination the Australian Liquor, Hospitality and Miscellaneous Workers’ Union, Western Australian Branch (the “applicant”) commenced proceedings under s44 of the *Industrial Relations Act, 1979* (the “Act”) alleging that Ms Reynolds had been terminated in a harsh, unfair and oppressive manner. Conciliation proceedings did not resolve the claim and the matter was referred for arbitration under s44(9) of the Act.
- 2 The schedule of the memorandum of matters referred for hearing and determination is as follows:
  - “1. The applicant claims the respondent summarily dismissed Jennifer Reynolds on 9 May 2003 in circumstances that were harsh, unjust, or unreasonable.
  2. The applicant seeks an order that the respondent compensate its member for the loss she has incurred.
  3. The respondent denies the claim and opposes the order sought.”
- 3 The respondent did not attend the hearing. When the Commission had a discussion with one of the respondent’s directors Mr Langdon on 18 November 2003 Mr Langdon advised the Commission that no one from the respondent was available to attend the hearing. It is clear that the respondent had notice of the hearing date and was aware that the hearing was to take place on 18 November 2003. As no reason was given to the Commission for the respondent’s inability to attend the hearing, I formed the view that in the circumstances the hearing should continue in the respondent’s absence pursuant to the Commission’s powers under s.27(1)(d) of the Act.

Applicant’s evidence

- 4 Ms Reynolds commenced employment with the respondent in July 2002 on a casual relief basis. By the beginning of August 2002 Ms Reynolds was working four days a week at the respondent’s Ballajura centre and one day a week at the respondent’s Midland centre. In November 2002 the respondent asked Ms Reynolds to apply for the Contact Co-ordinator position at its Midland centre. After Ms Reynolds was interviewed by the respondent and offered the position she accepted her appointment as Contact Co-ordinator on 29 November 2002. Her appointment was confirmed by the respondent on 12 December 2002 (Exhibit A1). A copy of this letter follows, formal parts omitted:

“Dear Jenny,

**Welcome to the Cuddles Group!**

I wish you well and hope that your time with us is a long, fruitful and fun one.

As we’ve agreed, you will manage our Midland Centre as our Contact Co-ordinator starting Monday 16<sup>th</sup> December 2002. Your hourly rate of pay will be in accordance with the Children’s Services (Private) Award as a Step 2 Director (\$17.88). After the initial probation period of three months, providing both parties are fully satisfied, I will review your hourly rate to a Step 3 Director.

This will be a challenging three months but I am so confident Jenny that you are the right person for this job.

You have my devoted and unconditional support. We are going to make a great team. I really look forward to working with you.”

(Exhibit A1)

- 5 Ms Reynolds gave evidence that she commenced as the Contact Co-ordinator at the Midland centre on 16 December 2002. Ms Reynolds is a qualified child care worker and holds a child care certificate and she has completed two years of additional study relating to child care. Prior to working with the respondent she worked for 11 years in a family day care centre and for three years in other child care centres.
- 6 In addition to managing the respondent’s Midland centre Ms Reynolds was in charge of the two and three year olds’ room and Ms Reynolds was aware that her role would be difficult as she was required to undertake both management duties and running this room. When Ms Reynolds commenced employment as the Contact Co-ordinator at the Midland centre she had some

assistance from a person by the name of Julie who oversaw the various centres run by the respondent. Ms Reynolds stated that no specific training was given to her by the respondent apart from this on the job training.

- 7 Ms Reynolds stated that four issues arose whilst she was employed at the Midland centre. There were two staff members who were uncooperative and therefore difficult to manage. One staff member in particular did not always comply with instructions given by Ms Reynolds. Ms Reynolds stated that she had to twice fill the position of Cook at the centre and as a result of problems filling this position Ms Reynolds had to buy groceries which the Cook normally did. Ms Reynolds gave evidence about an incident involving the centre bus which was used to take children to and from school. She stated that when she became aware in February 2003 that the bus was unregistered she contacted the respondent's Managing Director, Mr Gerard Carver, who told Ms Reynolds to contact the respondent's head office. Ms Reynolds stated that it took the respondent between three and a half to four weeks to fix the bus, meanwhile staff were required to use their own vehicles to take the children to and from school. As staff used their own vehicles the respondent was reluctant to resolve the issue of the bus's registration. However, when staff refused to continue to use their own cars the respondent dealt with the bus's registration. Ms Reynolds stated that parents became angry about the situation and a parent meeting was held on 16 March 2003 to discuss the issue. She stated that because the bus's registration took some time to resolve, parents were unhappy with the respondent. Ms Reynolds stated that the respondent was aware that parents had arranged for the meeting which took place on 16 March 2003. The last incident concerned two children who attended the centre whom Ms Reynolds believed were the subject of child abuse. After Ms Reynolds returned from two weeks' leave at the end of Easter in April 2003 it was brought to her notice that the two children had bruises. Ms Reynolds contacted the Department for Community Development ("DCD") and its officers intervened to deal with the situation. As a result of Ms Reynolds raising the issue with the DCD the children's step-father rang Ms Reynolds to complain about the respondent raising the matter with DCD. On the advice of one of the respondent's managers Ms Reynolds denied that she had made the complaint to DCD. Ms Reynolds stated that on one occasion she was upset and frightened when the step-father came to collect the children as he had previously abused her on the telephone in January 2003. She stated that DCD was very happy with the way she handled the situation but she felt let down by the respondent as the respondent gave her little or no support when dealing with this issue nor was she assisted with security at the centre at the time.
- 8 Ms Reynolds agreed that one of the respondent's directors, Mr Jocelyn Antone, handed her a document in March 2003 containing a number of suggestions to improve her management of the centre. This document reads as follows:

"Jenny,

The following suggestions will improve your situation in your centre.

1. Make up your roster either weekly or fortnightly.
2. When doing the roster make time for programming. [programs should fortnightly (sic)]
3. Are the daily activity sheets done daily?
4. Regardless of what ever problem arises the routines and procedures must be adhered to.
5. Check to see how many staff you require in the morning? Make what ever changes you require to meet your daily needs.  
Remember when it comes to roster changes explain to your staff why it is necessary for you to do so.
6. Before the rooms are amalgamated check the number of children you have left.
7. Do not mix babies and toddlers (sic) together the bigger children may hurt the babies. It is also our policy.
8. Beth "Must" have activities set up for the different times of the afternoons at the moment she is doing nothing to entertain the children. As the centre manager it is your responsibility to make sure this is happening.
9. You are amalgamating the rooms too early; the children will run muck (sic).
- 10 The rooms should only be amalgamated when you loose (sic) your forth (sic) staff.

**Jenny please follow this (sic) suggestion and let me know of any difficulties.**

Regards,

Jocelyn"

(Exhibit A2)

- 9 Ms Reynolds stated that she understood the issues raised with her by the respondent in this letter related to how she could better run the centre and was not a review of her performance. As far as she was aware the respondent did not have any concerns about her ability to undertake her job. Ms Reynolds stated that she was never given any written or verbal warnings about her performance. She stated that she undertook her job to the best of her ability.
- 10 When Ms Reynolds raised the difficulties she was experiencing in dealing with staff with the respondent she was told to crack down on the staff. Ms Reynolds conceded that as a result of undertaking a harder line with staff some staff left the centre. Ms Reynolds highlighted one instance when the respondent expressed disappointment with her. This was when she sought authorisation to employ additional staff when the number of staff dropped below the numbers required under the relevant regulations.
- 11 Ms Reynolds stated that on or about 3 April 2003 she was shown a letter by Julie about her probationary period being extended to 11 May 2003. Even though she was not given a copy of this letter she recalled the letter, which was dated 31 March 2003, referring to her not being strong enough and that her performance had to improve. She recalled the letter stated that if she wished to discuss the contents of the letter she could do so with Mr Carver. Ms Reynolds stated that she was not happy about her probation being extended as she understood her probationary period finished on 16 March 2003. Ms Reynolds also stated that the extension of her probation had not been discussed with her prior to receiving this letter. She stated that she did not do anything about the letter after it was raised with her because she undertook two weeks' leave the day after she was shown the letter. She tried to ring Mr Carver to discuss the letter when she returned from leave after Easter however he was unavailable at the time. She stated that this issue was overtaken by her becoming preoccupied with the child abuse incidents which arose soon after she returned from leave.
- 12 Ms Reynolds stated that there was only one other issue raised with her by the respondent after she returned from leave. This issue concerned her not completing the weekly budget for the centre. She stated that she was advised by her supervisor Julie at the time that she was not required to complete the budget for this particular week because she was dealing with the child abuse issue.

- 13 On 9 May 2003 Ms Reynolds met with Mr Carver. At this meeting she was handed a letter advising her of her termination which states as follows, formal parts omitted:

“Dear Jenny,

Following our letter dated 31 March 2003, in regards to your performance, we still feel that the Midland Centre requires a Co-ordinator with more experience and therefore have made the decision to release you from your position with one weeks (sic) notice as from today, Friday 9 May 2003. However, we would not need you to work at the Centre next week as we have already made arrangements for your replacement.

We acknowledge that you have been faced with demanding pressures which unfortunately you were not able to handle with the strong leadership that the position required.

All your entitlements and current wages will be paid to you at the next pay week.

We thank you for your time and wish you all the best for the future.”

(Exhibit A4)

- 14 After being handed the letter by Mr Carver, Ms Reynolds was told that she was being terminated. Ms Reynolds stated that she had no opportunity to discuss why she was being terminated, Mr Carver did not detail any specific reasons as to why she was being terminated, nor was Ms Reynolds given any opportunity to work out her notice period. Prior to leaving the meeting Mr Carver asked Ms Reynolds if she was prepared to undertake relief work with the respondent. Ms Reynolds understood this to mean that her services were still valued by the respondent. Ms Reynolds ceased working with the respondent that afternoon.
- 15 Ms Reynolds confirmed that her contract of employment was covered by the terms and conditions of the respondent’s Staff Handbook (Exhibit A5) and the terms and conditions of the document titled Management of the Centre covered employees working at the Midland Centre (Exhibit A6). Ms Reynolds confirmed that she was paid \$17.88 per hour and worked approximately 40 hours per week.
- 16 Ms Reynolds stated that subsequent to being terminated she suffered minor depression and as a result underwent a health assessment. She stated that as it was initially difficult for her to return to work in another position due to being stressed and depressed. As a result she was unable to work for six weeks after her termination. After this period she undertook relief child care work with an agency. During the period from June 2003 through to the hearing on 18 November 2003 Ms Reynolds earned approximately \$12,854 (Exhibit A7). Ms Reynolds stated that she enjoyed her work at the Centre, she loved the children and she enjoyed working with the parents. Ms Reynolds understood that she had an ongoing expectation of work with the respondent for some time. She stated that if the respondent had any issues about her performance she expected that these issues would have been discussed and worked through and this would have enabled her to continue working with the respondent.

#### Submissions

- 17 The applicant maintains that Ms Reynolds was unlawfully terminated and in a summary fashion on 9 May 2003 when she was given one week’s pay in lieu of notice at termination and told that her services were no longer required from that date. In terminating Ms Reynolds this way the respondent breached the notice provisions of the Children’s Services (Private) Award (the “Award”) as there was no capacity for the respondent to make a payment in lieu of notice unless by mutual consent. The respondent also breached its Management of the Centre document (Exhibit A6) which provides that employees are entitled to two weeks’ notice on termination.
- 18 The applicant argues that the respondent had no reason to terminate Ms Reynolds and that Ms Reynolds was denied procedural fairness given the manner of her termination. There was no evidence that the respondent conducted an investigation into the issues it relied on to terminate Ms Reynolds and no specific concerns were put to Ms Reynolds when she was terminated. Further, Ms Reynolds was not given any opportunity to improve her performance prior to being terminated as Ms Reynolds commenced leave soon after her probation was unilaterally extended by the respondent. Ms Reynolds was thus only given two weeks to improve to the respondent’s satisfaction. No formal training was given to Ms Reynolds and she was not advised that if her performance did not improve she would be terminated. In the circumstances the applicant is seeking the maximum compensation for Ms Reynolds for loss of earnings and injury.

#### Findings and Conclusions

##### Credibility

- 19 I listened carefully to the evidence given by Ms Reynolds. In my view Ms Reynolds’ evidence was honest, plausible and consistent and her evidence was supported by the exhibits tendered in these proceedings. I therefore have no hesitation in accepting the evidence given by Ms Reynolds.

##### Was Ms Reynolds summarily terminated?

- 20 When Ms Reynolds was terminated by the respondent she was paid one week’s pay in lieu of notice and she was terminated in a summary fashion as she was told to leave the respondent’s premises on the day of her termination. The issue of whether a dismissal of this nature constitutes a summary termination or a termination on notice was recently canvassed by Smith C in *Thomas Howell v Barmingo Pty Ltd* (2002) 82 WAIG 2528 at 2533:

“Mr Gifford on behalf of the Respondent contends that the onus of proof that the Applicant was harshly, oppressively or unfairly dismissed lies on the Applicant as the Applicant’s employment was terminated by the payment by the Respondent of pay in lieu of notice. In support of its submissions the Respondent relies upon the decision of the Full Bench in *Newmont Australia Ltd v Australian Workers’ Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677. In that case the Full Bench of the Commission observed that where an employee’s employment was terminated by summary dismissal there is an obligation upon the employer to show on balance that misconduct had in fact occurred. The Respondent contends that in this case the Applicant was not dismissed for misconduct but for poor performance so the nature of the termination was not summary. In *The Federated Miscellaneous Workers’ Union of Australia, WA Branch v Cat Welfare Society Incorporated* (1991) 71 WAIG 2014 at 2019 Sharkey P and Gregor C observed:

“It seems to us that whether a dismissal has occurred in circumstances where pay in lieu of notice is made, that the question is one of mixed fact and law as to whether what occurred was a summary dismissal or not.

One consideration is that it depends whether such payment is permissible. That in turn depends on the contract and its construction (see Macken JJ, McCarry G and Sappideen C “The Law of Employment”, 3rd Edition, pages 170-172). In some industries, also, it might be said to be a custom. If then, a payment in lieu of notice

were not provided for in the contract, then proper notice has to be given or there is a summary dismissal. The same would apply if there were no custom or usage.

It follows that a summary dismissal, as a matter of fact and law, cannot be altered in its nature by payment in lieu of notice."

Further Smith C observed:

"More recently in *Sanders v Snell* [1998] HCA 64 at [16]; (1998) 196 CLR 329 at 337 Gleeson CJ, Gaudron, Kirby and Hayne JJ held that where there is no condition in a contract of employment for payment in lieu of notice, the employer is in breach of the contract if the employer does not give the employee requisite notice of termination. In that case there was a written contract of employment which specified a period of notice to be given.

It is apparent that the Applicant was not immediately paid pay in lieu of notice as he initially made a claim in his application for such a payment. Further, for the reasons set out below I am of the view that the Applicant's termination was sudden and unexpected. It is my view that the Applicant was summarily terminated and the onus of proving the circumstances justifying the termination rests upon the Respondent."

On the evidence before me I find that when the respondent paid Ms Reynolds in lieu of notice at termination it acted unlawfully as there was no term of Ms Reynolds' contract of employment allowing for this payment to be made. Further I am not aware that in this industry there is any compelling reason for removing an employee from his or her workplace without allowing a notice period to be worked. Indeed, in the circumstances of this particular case there does not appear to be any reason for this course of action. It therefore follows that Ms Reynolds was thus summarily terminated.

- 21 When an employee is summarily terminated there is an evidential onus upon the employer to prove that the employee's summary dismissal was justified. (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* op cit). The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree (*Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819). In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed:

"Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

- 22 As the respondent did not attend the hearing the reasons for Ms Reynolds' termination are unclear. However, on a review of Ms Reynolds' evidence and the exhibits tendered in these proceedings I am satisfied that Ms Reynolds was not guilty of gross misconduct justifying summary dismissal. Further, I am satisfied that Ms Reynolds was treated unfairly and harshly because she was not given sufficient opportunity to defend herself against the allegations relied upon to effect the termination. She was not afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).
- 23 When Ms Reynolds was terminated on 9 May 2003 the respondent may have been acting on the basis that Ms Reynolds was on probation when she was terminated. It was clear from Ms Reynolds' letter of appointment that her initial three months' probation period ceased three months after her appointment on 16 December 2002. I accept Ms Reynolds' evidence that she did not accept her period of probation being extended when she was advised by Julie on or about 3 April 2003 that her period of probation was to be extended to 11 May 2002 and it is clear that the respondent sought to extend Ms Reynolds' probationary period after her three months of probation had ended. In the circumstances find that Ms Reynolds was not on probation when she was terminated on 9 May 2003.
- 24 Even if I am wrong in finding that Ms Reynolds was not on probation when she was terminated I am of the view that Ms Reynolds was unfairly terminated in any event even if her probationary period had not ceased. An employee who is on probation should be afforded the opportunity to correct any performance deficiencies and be given feedback about any shortcomings and relevant training. I accept Ms Reynolds' evidence that throughout her employment with the respondent she was not given any formal training, nor did the respondent make it clear to Ms Reynolds that her job was in jeopardy unless certain performance issues were addressed. In my view she was not afforded the proper rights to training and feedback that would normally be associated with a period of probation.
- 25 I am of the view that Ms Reynolds undertook her role as Contact Co-ordinator proficiently. It is clear no warnings were given to Ms Reynolds about her performance and that the issues Ms Reynolds identified as being problems for her were in the main issues that did not result through any incompetence by Ms Reynolds. Even though Ms Reynolds received feedback in March 2002 from Mr Antone about how to improve the management of the centre (Exhibit A2) I regard these suggestions as being part of the normal reminders which would be given to an employee who had recently commenced managing a child care centre and that this feedback was not an adverse reflection on Ms Reynolds' performance.
- 26 I find that applicant was denied procedural fairness given the manner of her termination. At the meeting held with Mr Carver on 9 May 2003 Ms Reynolds was not given specific reasons for her termination nor was she given an opportunity to respond to concerns about her performance. She was not offered any opportunity to have a witness present, nor was she made aware of what, if any, investigation the respondent had undertaken to form the view that her performance was such that she should not continue her employment with the respondent. Ms Reynolds was not given any notice prior to the meeting that it was to be disciplinary in nature. In all of the circumstances I thus find that Ms Reynolds was unfairly terminated.
- 27 Ms Reynolds is seeking compensation for injury. The notion of injury must be treated with some caution (*AWI Administration Services Pty Ltd v Andrew Birnie* (2001) 81 WAIG 2849). In *AWI Administration Services Pty Ltd v Birnie* (op cit) at 2862 Coleman CC and Smith C observed:

"It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an

employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299)."

- 28 I accept in this instance that Ms Reynolds suffered some injury over and above that normally associated with a termination. I accept Ms Reynolds' evidence that when she was terminated unexpectedly and without notice, and with no specific reasons given to her that she suffered minor depression and stress and had to seek medical assistance as a result of the manner in which the respondent terminated her. I find that this contributed to Ms Reynolds being unable to undertake further work for a period of approximately six weeks. In the circumstances it is my view that Ms Reynolds should be awarded \$300.00 for injury.
- 29 I am satisfied on the evidence that the working relationship between Ms Reynolds and the respondent has broken down such that an order for re-instatement would be impracticable. I therefore now turn to the question of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886. On the evidence, I am satisfied Ms Reynolds took reasonable steps to mitigate her loss as she obtained alternative employment approximately six weeks after her termination.
- 30 I am satisfied Ms Reynolds had a reasonable expectation of ongoing employment with the respondent. Ms Reynolds was a qualified child care worker who had approximately 14 years experience in the industry. Not only was she invited to apply for the Contact Co-ordinator position by the respondent after working with the respondent for some months, I accept that Ms Reynolds was a competent employee as Ms Reynolds had no difficulty obtaining agency employment in the child care industry after her employment was terminated. I also take into account Ms Reynolds' evidence that she believed that she would have been able to work through any concerns that the respondent had with her performance. On the evidence before me there does not appear to be any significant performance issues that would have warranted Ms Reynolds' long term position with the respondent being in jeopardy. I also take into account that on 9 May 2003 Ms Reynolds was offered employment by Mr Carver on a casual basis after she was terminated. Ms Reynolds stated that she enjoyed working at the centre and had a good relationship with parents and the children at the centre. I have thus formed the view that Ms Reynolds would have had an expectation of at least another 12 months' service with the respondent. Ms Reynolds worked on average 40 hours per week and was paid \$17.88 per hour. This equates to an amount of \$715.20 per week, or \$37,190.40 on an annual basis. From this amount I deduct \$12,851 which Ms Reynolds earned since being terminated by the respondent. As the difference between these amounts is greater than six months' compensation I therefore order that Ms Reynolds be paid \$18,595.20 as a gross amount (26 weeks x \$715.20) as compensation for her unfair termination. As Ms Reynolds is to be paid the maximum amount of compensation she is entitled to under the Act for her unfair termination, the amount of \$300.00 for injury is subsumed into this amount.
- 31 A Minute of Proposed Order will now issue.

**2004 WAIRC 10878**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v- CUDDLES GROUP PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE OF ORDER</b>	MONDAY, 15 MARCH 2004	
<b>FILE NO/S</b>	CR 106 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10878	

**Result** Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement

*Order*

WHEREAS on 3 March 2004 the Commission issued Reasons for Decision and a Minute of Proposed Order in this matter; and

WHEREAS on 12 March 2004 the Commission conducted a Speaking to the Minutes of Proposed Order; and

WHEREAS the respondent's representative made submissions that the respondent was unable to pay compensation of a lump sum and sought an order for payment by instalments over a period of two months; and

WHEREAS the applicant argued that the respondent had the opportunity to raise these issues at hearing; and

WHEREAS the Commission was of the view after hearing from the parties that it would grant payment by instalments and that the sum would be payable in two equal instalments over a 28 day period; and

NOW THEREFORE having heard Mr M Swinbourn on behalf of the applicant and Ms D Flint of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

- 1 DECLARES THAT the dismissal of Jennifer Louise Reynolds by the respondent was unfair and that reinstatement is impracticable;
- 2 ORDERS the respondent to pay Jennifer Louise Reynolds compensation in the sum of \$18,595.20 gross in two equal instalments of \$9,297.60, the first payment being due within 14 days of the date of this order and the second payment due within 28 days of the date of this order.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

2004 WAIRC 10968

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v- SEAFOCUS HOLDINGS PTY LTD T/A STATION STREET MARKETS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S WOOD	
<b>DELIVERED</b>	THURSDAY, 25 MARCH 2004	
<b>FILE NO</b>	CR 110 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10968	

<b>Catchwords</b>	Termination of employment – Harsh, oppressive and unfair dismissal – No dismissal – Change in hours – Cleaners and Caretaker Award – nature of employment casual –Application dismissed
<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	Ms S Northcott
<b>Respondent</b>	Mr J Brits of Counsel

*Reasons for Decision*

- 1 This is an application pursuant to section 44 of the *Industrial Relations Act, 1979* (“the Act”), the matter came on for conference on 10 June 2003, was unable to be resolved and was referred to hearing. The claim made by the applicant union and translated into the Memorandum for Hearing and Determination reads as follows:

“THE APPLICANT

1. The applicant union claims the respondent dismissed its employee Michael Howarth in circumstances which were harsh, unfair or oppressive within the meaning of the Industrial Relations Act 1979.
2. The applicant union further claims the respondent has denied Mr Howarth the benefit of being allocated and paid for an average of 42 hours per week across Wednesday to Sunday, being a benefit to which he was entitled under his contract of employment.
3. The applicant union seeks orders that the respondent reinstate Mr Howarth to his previous contract of employment, and further that the respondent compensate Mr Howarth for the denial of his contractual benefits from Monday 17 February 2003 to the date of reinstatement.
4. The applicant union further and in the alternative seeks any other order that the Commission deems appropriate.

THE RESPONDENT

The respondent opposes the claim and orders sought.”

- 2 The respondent’s name was amended by consent at hearing to Seafocus Holdings Pty Ltd trading as the Station Street Markets.
- 3 It is common ground that the applicant’s member, Mr Michael Howarth was engaged by the respondent, which operates the markets, on 11 August 2002. Mr Howarth was engaged as a casual employee to undertake the work of an employee who had gone on 4 weeks leave. His duties were primarily to clean the markets, however, he was also responsible for some setting-up of furniture and minor painting and maintenance work. On return from leave in September 2002 the employee indicated that he did not wish to work week-ends and hence Mr Howarth’s hours were extended to work primarily Wednesday to Sunday on an average of 44 hours per week. There is a dispute about whether Mr Howarth was covered by the Cleaners and Caretakers Award, whether he was made a full-time employee at that time, and the meaning of the pattern of his hours and days of work. Mr Howarth continued working until February 2003 when he says, having complained about not being paid overtime and not wanting to sign an Australian Workplace Agreement, his hours were reduced from he says 44 hours to 32 hours per week (on average) and he was employed during the week and not on weekends. He claimed he was unfairly dismissed at that time and seeks reinstatement of his employment to 44 hours per week from Wednesday to Sunday. He says also that since that time he has lost approximately \$141 gross per week and seeks an order that the respondent pay him those lost earnings.
- 4 The respondent says that Mr Howarth has always been and remains a casual employee. Additionally, the respondent says that he is not award covered but instead the Cleaners and Caretakers Award is used as a guide. The respondent denies that Mr Howarth was dismissed at all. He continued to be employed. They say his hours and days were changed as they could not afford to pay him overtime and take the risk of a later claim for overtime. The respondent says that Mr Howarth made derogatory comments to customers and stall holders about management’s treatment of him, they therefore limited his days to reduce his contact with customers and stall holders. They say they would be prepared to extend his hours to 38 hours per week, but only during weekdays.
- 5 The claim of the applicant is that Mr Howarth was dismissed unfairly and they seek him to be reinstated without loss of benefit. This is the matter in dispute which the applicant sought to refer for hearing and determination and this is the manner in which the applicant’s case was presented to the Commission. The applicant then says that the Commission under its powers pursuant to sections 44, 26 and 23 can effect a remedy. I have no difficulty with the later submission, however, for the claim to have substance there must first be a termination at the initiative of the employer. In this case there has been no termination of the employment relationship. Mr Howarth continued to be employed for about 32 hours each week. The argument must seemingly be that Mr Howarth was dismissed from his contract of 44 hours per week Wednesday to Sunday. The other way to portray the matter is that Mr Howarth was somehow unfairly treated to the extent that the Commission should resolve the dispute, and mindful of the Commission’s obligation under s.26, should intervene to correct the inequity or unfairness. This later presentation of the claim is not consistent with the matter referred for hearing. However, in any event, I will say more on that later.

6 In this matter, it is clear that no dismissal has occurred, Mr Howarth suffered simply a change to his working pattern and a reduction in his hours and hence remuneration. A dismissal connotes the end of an employment relationship, not simply a change to that employment relationship or a change to the contract. This issue has been enunciated in many decisions of the Commission (see for example *Troy Tran v Boutique Consolidated Pty Ltd t/as Tony Barlow Menswear* 82 WAIG 169 and the decisions referred to therein).

7 The contract may have been altered so fundamentally that the employee is entitled to treat the contract as being at an end. This point is made clearly in the decision of *Western Excavating(ECC) Limited v Sharp* (1978) QB 761 in which Lord Denning states:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

8 Mr Howarth did not treat the contract as at an end. He continued to work the reduced hours and protested about the change, obtained the assistance of the union and some months later sought the assistance of the Commission under s44 of the Act to resolve the dispute. There is a difficulty in now claiming payment for the ten to twelve hours per week which he says that he lost. He has not performed the work. Macken, McCarry & Sappideen’s *The Law of Employment* Fourth Edition at p.221 states:

“The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by breach.”

See also *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435

9 There is an issue as to whether Mr Howarth can be said to have accepted the new contractual arrangements by continuing to work under the new arrangements (*Belo Fisheries v Dennis Terence Froggett* (1983) 63 WAIG 2394). His displeasure with the new arrangements was evident. However, he continued to work the reduced hours and the changed days although he wanted to be put back on weekends. His duties he says were different as he worked on days when the markets were closed. However, his duties still involved largely cleaning and maintenance work. His attitude at hearing was that it was unfair not to allow him to return to the job he had earlier as that was his job.

10 In addressing these points it is necessary to decide upon the nature of Mr Howarth’s employment. The respondent says that Mr Howarth was engaged at all times as a casual employee and that his employment was not covered by the Cleaners and Caretakers Award. The respondent says that for the purposes of this matter it is not necessary to decide upon award coverage and that is a matter for the Industrial Magistrate. The applicant says that their member was not a casual worker and was covered by that award.

11 The respondent referred to the decision in *R.J. Donovan & Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, WA Branch* 57 WAIG 1317 and the test applied therein. In terms of the respondents to the award the closest industry to the respondent’s business in their submissions is that of estate agents and property agents. These are businesses which require licenses. The respondent submits that their business is to simply rent stalls in the market, they are not involved in retailing and hence they are not covered by the award. The applicant submits that the business is that of retail markets, not dissimilar to a Myer store. Alternatively, the applicant says that the business is one of a property agent which is also covered by the award. Otherwise the applicant says that the respondent agreed to be bound by the award in that Mr Terry Sheridan, the acting Manager at one time, advised Mr Howarth that he was employed under this award.

12 Both parties agree that the application or otherwise of the award is not fatal to the application in that Mr Howarth maintains that he was offered and accepted full-time employment. The offer was made by Mr Sheridan to cover for the hours which a fellow employee, Bala, no longer wished to work. This occurred in September 2002 and continued until February 2003.

13 Under cross-examination Mr Howarth says that he told Mr Sheridan that he wanted full-time work and that Mr Sheridan agreed to this. He says that his hours varied week to week as did his start and finish times. When he commenced work it was agreed that he could work any day of the week. He says that rosters are not always issued.

14 Ms Suzette Perry, the Manager of the markets, gave evidence that Mr Howarth’s start and finish times and his hours changed depending on the work requirements. She complained that Mr Howarth was reasonable as a cleaner but that his attitude was not as required and that he had been warned for attending work smelling of alcohol. She says that the markets could not afford to pay Mr Howarth overtime rates and that Mr Howarth’s adverse comments to the public about management were of concern and a reason why he was taken off weekend work.

15 The relevant provisions of the Cleaners and Caretakers Award are as follows:

### “3. - AREA AND SCOPE

This award shall apply to all workers in the callings set out in Clause 22. - Wages of this award in the industries carried on by the respondents: Provided however that it shall not apply to any worker who carries out the duties of a verger, nor to any worker covered by any other award or industrial agreement in force on 7th November, 1969.

### 5. - DEFINITIONS

(3) "Cleaner" shall mean a worker other than a window cleaner substantially employed in performing cleaning work including glass partitions”.

16 A casual worker in the award is defined as a worker who is engaged by the hour and whose contract of service is terminable on one hour’s notice. A part-time worker is one who is regularly employed and who works less than 38 hours per week.

17 In relation to the award coverage it is the case that this is not a matter upon which a finding needs to be made in order to decide this application. I make no finding as to whether Mr Howarth’s employment is or is not covered by the Cleaners and Caretakers Award. The dispute in relation to the award is about whether overtime was payable in any event. That is a matter not before me. Additionally, the award if it applied would take me no further in a definitional sense as to the meaning of

casual employment. However, I would make the following observations. It does not appear to be a matter of dispute between the parties that Mr Howarth's work is predominantly that of a cleaner and in addition he does maintenance work. I do not have evidence as to the proportion of the duties but he would appear to predominantly operate as a cleaner and hence his work is capable of being covered by the award. The award covers respondents who conduct the business of a retail store. That is clear, but what is equally clear is that the respondent is not in that business. The respondent rents space for stalls to sell their wares. The business is therefore more akin to a shopping mall owner and the only listing within the respondentency list which may approximate this is that of property agent. However, I doubt, particularly without further and better information, that the respondent could be said to be in the business of a property agent. Having said that, and whilst I doubt that Mr Howarth's employment is covered by the award, I do not make a finding on the matter (see also Exhibit R7).

- 18 The decision in *The Metals and Engineering Workers Union Western Australia v Centurion Industries Ltd (1996) 76 WAIG 1287 @ 1288* outlines the criteria used frequently by the Commission for assessing whether a contract of employment is casual in nature. These criteria are:
- a. The classifying name given to a worker initially accepted by the parties.
  - b. The provisions of the relevant award.
  - c. The reasonable expectation that work would be available to him.
  - d. The number of hours worked per week.
  - e. Whether his employment was regular.
  - f. Whether the employee worked in accordance with a roster published in advance.
  - g. Whether there was a reasonable and mutual expectation of continuity of employment.
  - h. Whether notice is required by an employee prior to the employee being absent on leave.
  - i. Whether the employer reasonably expected that work would be available.
  - j. Whether the employee had a consistent starting time and set finishing time."
- 19 Before I assess each of these criteria I should say something of my assessment of the evidence.
- 20 There is little dispute about the factual matrix in this matter. However, on hearing the evidence I have greater faith in the evidence of Ms Suzette Perry, the manager of the markets, than in Mr Howarth's evidence. Mr Howarth was not prepared to address himself directly to questions in cross examination. When Mr Brits for the respondent explored the inconsistency in Mr Howarth's view about whether his employment was casual Mr Howarth was not straightforward in his answers. When his behaviour towards customers and stall holders was explored, Mr Howarth was equally evasive. My clear impression of Mr Howarth at hearing is that he maintains an attitude which is resistant to direction.
- 21 Having said that, it is plain in my view and I so find, that Mr Howarth's hours and days of work were changed in February 2003 because he had complained about management's treatment of him and because he did not sign an Australian Workplace Agreement. He says he was told by Mr Brown the owner of the markets, that he could have all the hours he wanted if he signed the agreement. This point was not challenged in cross-examination and should be accepted, although I have some caution about Mr Howarth's evidence as expressed. The respondent's evidence is clear. They could not afford to pay Mr Howarth overtime and would not risk having to pay him those rates. They do not complain greatly about Mr Howarth's work performance. They do complain about his attitude and have warned him on occasion.
- 22 I accept the evidence of the respondent that Mr Howarth was spoken to and was warned about aspects of how he had conducted himself. I do not go to all the detail of this as it is not relevant in my view. The only relevant conduct is whether he made complaints to customers and stall holders about management's treatment of him and I find that he did, notwithstanding his denials. This is my view, having considered all the evidence, led to some loss of trust in him by the employer. However, the main reason for the restriction on the days worked Monday to Friday is the question of overtime payments and I so find. The employer says they would extend Mr Howarth's hours to 38 hours per week during Monday to Friday. It must be the case that customers and stall holders would be present in the markets during a portion of that time. Hence presumably Mr Howarth is not prevented entirely from having contact with them. I do not doubt this was a factor in the employer's mind but essentially overtime is the prime issue. Mr Howarth continued to be employed by the respondent, and his performance is at least reasonable, except for some occasions where his conduct has caused complaint.
- 23 In relation to whether Mr Howarth's employment is casual or not, the parties keenly dispute criterion (a). The evidence for Mr Howarth rests on his evidence that he was offered full-time employment by Mr Sheridan in September 2002. He says that he commenced as a casual but that his employment status changed at the point when he took over Bala's hours. There is no oral evidence to contradict this except that Ms Perry, who was away from work at that time, says that at all times Mr Howarth was employed as a casual. As I have said I have greater confidence in the evidence of Ms Perry and her directness under cross-examination. What is also clear to me is that Mr Howarth did not at any time challenge the absence of leave or other entitlements which are the norm for full-time employees. His complaints have been about how many hours he could work, whether he could work weekends and whether he would be paid overtime. In other words he was understandably after money. He would earn more if he worked weekends and worked more hours. He did not directly challenge his status as a casual employee. In fact he acknowledges that status in a letter to Ms Perry about overtime in February 2003 [Exhibit A1, MH10]. Similar references are made by the employer to Mr Howarth's employment status in [Exhibits R2 and R3]. It is the case that Mr Howarth started his employment as a casual and I consider that it is most likely that this "classifying name" never changed between the parties notwithstanding the change to hours worked. I so find.
- 24 The award, which I doubt applies, takes me no further. In relation to criterion (h) there is no evidence that Mr Howarth either sought or took leave. If one examines [Exhibit A1, MH8 and Exhibit R5] closely, then it is clear that Mr Howarth's days, start and finish times, and hours did vary somewhat. He worked few hours in his first week; he then worked considerable but quite varied amounts of hours through until late February 2003; he then worked a relatively consistent pattern of 32 hours per week except for minor variation (eg in April 2003). I do not know whether the absence of work on two Fridays in April 2003 was due to the employer or employee. There is no evidence that Mr Howarth took leave or that leave was part of his contract. The evidence would suggest instead that leave was not contemplated in the contract.
- 25 Mr Howarth's employment could be said to be regular in that he worked different days at times but there was a pattern of work to which he complied. There was no roster posted as such for the bulk of the relevant time. However, he could expect work as there was always work allocated to him and the employer could expect Mr Howarth to be there. There is an indication in Exhibits R2 and R3 (albeit R3 is after the dispute came to the Commission) that Mr Howarth was subject to change of hours at limited notice. Certainly there is evidence that his start and finish times did vary somewhat, though not markedly. The

number of hours which Mr Howarth worked and the continuity of his employment in terms of the days worked are part of the sources of Mr Howarth's discontent. Again though Mr Howarth worked on a varied but continuous basis in that there were no periods in which he did not or was not required to work. The actual number of hours worked I have already commented upon; it is not the case though that simply because Mr Howarth worked more than 38 hours per week, for many weeks, that he cannot then be said to be a casual employee.

- 26 If I weigh these factors I cannot conclude and I am not convinced that the applicant has made out the case that Mr Howarth's employment status was not one of casual employment. Mr Howarth's own evidence concerning his expectation that he was not casual is based on a conversation he had with Mr Sheridan in September 2002. This evidence is damaged by his letter to Ms Perry in February 2003 where he says that "I have been employed by you since 11 August 2002 till now on a casual basis as a cleaner". It is the case that the employment status of an employee cannot be determined merely by the label placed upon it. In other words an employer cannot merely label a job as casual in nature if in fact it is not. However, in my mind Mr Howarth knew at all times that he was employed as a casual employee and that his hours and days of work were then subject to change, as indeed they did. Having weighed the evidence in this matter I find that Mr Howarth was at all times of his employment a casual employee.
- 27 As I have indicated Mr Howarth's chief complaint with his employer is that he wanted to work the weekends, to work the extra hours and to be paid the penalties as prescribed in the award. Having made the findings as above it is then clear that Mr Howarth was either not entitled to make such demands or alternatively, in the case of the award, it is unlikely in my view that such a demand could be sustained. It is also clear that Mr Howarth was not dismissed. His employment continued. I would go further and say that Mr Howarth, even though he complained about the change in his hours and days, did in effect accept the contract, particularly given the nature of his contract as a casual. In that sense the facts in this matter are distinguishable from those in the case of *Troy Tran*. It is my clear impression that Mr Howarth's attitude was that he was entitled to dictate when he was going to work, and that is not the reality of the situation. For all of these reasons I would say that the applicant's case has not been made out and the application will be dismissed.
- 28 Lastly, the applicant submits that in fact even if there has been no dismissal then the Commission should somehow find that Mr Howarth has not been fairly treated and the Commission should effect a remedy cognisant of the Commission's obligations under s.26 of the Act. I would have a reservation about such a course of action given the manner of referral and given the way in which the case was argued. Nevertheless, in my mind I do not consider that Mr Howarth has not received a fair go because his hours were reduced as he did not sign the AWA and the respondent wanted to avoid paying him overtime. I put the argument that way because I understand that that is what the applicant would rely upon and they would say that the respondent's actions were discriminatory. Clearly the respondent wanted to avoid paying him overtime. Ms Perry's evidence supports this conclusion. However, it is obvious from my reasoning that I consider it unlikely that they had that obligation in any event. Of equal importance is the fact that at no time did they seek to terminate Mr Howarth's employment. They in fact continued to employ him for 32 hours per week and at hearing were still prepared to increase that to 38 hours per week, but not on weekends. That is hardly discriminatory in my view or in some way unfair to Mr Howarth. Mr Howarth instead demanded that his employment be structured in the manner which suited him and which belatedly, and wrongly, he says that he was contractually entitled to. I would add to that and say that I accept that the complaints by Ms Perry about Mr Howarth's attitude have merit. She says that she considered him to be a good cleaner but otherwise had difficulty with his attitude and had to reprimand him for arriving at work smelling of alcohol. Mr Howarth in my view cannot sustain a claim that he was somehow treated badly because he did not sign an AWA.

2004 WAIRC 10969

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH	<b>APPLICANT</b>
	-v-	
	STATION STREET MARKETS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S WOOD	
<b>DATE OF ORDER</b>	THURSDAY, 25 MARCH 2004	
<b>FILE NO</b>	CR 110 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10969	
<b>Result</b>	Application dismissed	
<b>Representation</b>		
<b>Applicant</b>	Ms S Northcott	
<b>Respondent</b>	Mr J Brits of Counsel	

*Order*

HAVING heard Ms S Northcott on behalf of the applicant and Mr J Brits of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S WOOD,  
Commissioner.

**CONFERENCES—Notation of—**

Parties		Commissioner Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Cuddles Group Pty Ltd	Harrison C C 106/2003	19/09/03	Alleged unfair, harsh and oppressive dismissal of member, MsReynolds	Referred
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Cuddles Group Pty Ltd	Harrison C CR 106/2003	12/03/04	Alleged unfair, harsh and oppressive dismissal of member, MsReynolds	Concluded
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Department of Conservation and Land Management	Scott C C 38/2004	20/02/04, 15/03/04	Permanency of member	Referred
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Education Department of Western Australia	Harrison C C 35/2004	3/03/04	Classification	Discontinue d
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Prosser Scott & Co	Scott C C 271/2003	N/A	Unfair dismissal	Concluded
Civil Service Association of Western Australia Incorporated	Commissioner, Western Australian Police Service	Scott C PSAC 3/2004	22/01/04	Employment of Ms A. D'Souza	Concluded
Civil Service Association of Western Australia Incorporated	Director General, Department of Justice	Scott C PSAC 52/2003	03/10/03, 05/03/04, 09/03/04	Reclassifications	Referred
Civil Service Association of Western Australia Incorporated	Director General, Department of Justice (Formerly known as Ministry Of Justice)	Scott C PSAC 53/2003	21/10/03	Long Service Leave entitlements	Concluded
Civil Service Association of Western Australia Incorporated	The Executive Director, Department of Fisheries	Scott C PSAC 1/2004	09/01/04, 13/01/04, 14/01/04, 02/02/04, 05/02/04, 09/02/04, 12/02/04, 17/02/04, 08/03/04	Bans on performance of Marine Safety Duties	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Aerospace Engineering Services Pty Ltd	Gregor C C 46/2004	3/03/04	Union member recieved a final written warning	Concluded

Parties		Commissioner Conference Number	Dates	Matter	Result
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)	BHP Billiton Iron Ore Pty Ltd	Kenner C C 119/2003	N/A	Reduction of remuneration after training session.	Discontinued
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	BHP Iron Ore Pty Ltd	Kenner C C 88/2001	7/06/01	Dispute with regard to standing down and disciplinary action taken against electrician Mr Lew West	Discontinued
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Global Electrotech Pty Ltd	Gregor C C 65/2004	25/03/04	Termination of a Union Member	Settled
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch and Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	PB Foods Ltd	Wood C C 219/2003	09/10/03, 19/11/03, 22/03/04	Disciplinary letter and re-credit leave	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	West Australian Newspapers Ltd	Wood C C 3/2004	5/03/04	Number of employees on shift	Concluded
Hospital Salaried Officers Association of Western Australia (Union of Workers)	TCA Radiology	Scott C CR 195/2003	N/A	Suspension from employment	Dismissed
The Australian Rail, Tram and Bus Industry Union	A/Chief Executive Officer, Public Transport Authority of Western Australia, Public Transport Centre	Wood C C 186/2003	08/08/03, 20/08/03, 30/10/03, 04/11/03, 22/11/03	Dispute regarding change to transit guards roster	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	AMEC Engineering Pty Ltd	Wood C C 255/2003	2/03/04	Termination of employment	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	BHP Billiton Iron Ore Ltd	Wood C C 29/2004	25/02/04	Clothing policy	Concluded

Parties		Commissioner Conference Number	Dates	Matter	Result
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Decmil Australia	Gregor C C 28/2004	10/02/04	Income protection not being paid	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Macmahon	Gregor C C 63/2004	2/04/04	Dispute with benefits set out in settlement agreement	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Cockburn Cement Limited	Gregor C C 34/2004	11/02/04	Industrial action	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Downer RML Pty Ltd	Gregor C C 33/2004	26/02/04	Termination	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Simon Engineering Australia	Gregor C C 52/2004	26/02/04	Industrial action on worksite	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Simon Engineering Australia and Kerman Contracting Pty Ltd	Wood C C 240/2003	14/01/04	Industrial Action following unsuccessful attempts by parties to negotiate an Industrial Agreement	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	Hamersley Iron Pty Ltd	Beech C C 246/2003	N/A	Christmas and Boxing day shutdown	Referred

## PROCEDURAL DIRECTIONS AND ORDERS—

2003 WAIRC 09040

**PARTIES**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
NORA GAULD WHYTE

**APPLICANT**

-v-

MARY-ANNE KENWORTHY IMAGE INTERNATIONAL

**RESPONDENT****CORAM**

COMMISSIONER S J KENNER

**DATE**

THURSDAY, 14 AUGUST 2003

**FILE NO**

APPLICATION 1803 OF 2002

**CITATION NO.**

2003 WAIRC 09040

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<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr D Robinson as agent
<b>Respondent</b>	Mr S Burke of counsel

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*Direction*

HAVING heard Mr D Robinson as agent on behalf of the applicant and Ms S Burke of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the hearing date of 25 August 2003 be and is hereby vacated.
2. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
3. THAT the applicant file and serve upon the respondent any signed witness statements upon which she intends to rely no later than 14 days prior to the date of hearing.
4. THAT the respondent file and serve upon the applicant any signed witness statements upon which she intends to rely no later than 7 days prior to the date of hearing.
5. THAT the applicant and respondent file an agreed statement of facts (if any) no later than 7 days prior to the date of hearing.
6. THAT the matter be listed for hearing for 2 day(s).

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

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2004 WAIRC 10929

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	HANSSEN PTY LTD	<b>APPLICANT</b>
	-v-	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J F GREGOR	
<b>DATE</b>	FRIDAY, 19 MARCH 2004	
<b>FILE NO/S</b>	APPLICATION 1154 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10929	

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<b>Result</b>	Discontinued
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*Order*

WHEREAS on 25<sup>th</sup> July 2003 Hanssen Pty Ltd applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979*; and

WHEREAS the matter was listed for hearing on 23<sup>rd</sup> September 2003 and by consent the hearing was vacated and the matter was adjourned sine die; and

WHEREAS on 10<sup>th</sup> March 2004 the Applicant advised the Commission in writing that it would abandon the application and the Commission decided to discontinue the proceedings.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

[L.S.]

(Sgd.) J F GREGOR,  
Commissioner.

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2004 WAIRC 10928

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	HANSSEN PTY LTD	<b>APPLICANT</b>
	-v-	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J F GREGOR	
<b>DATE</b>	FRIDAY, 19 MARCH 2004	
<b>FILE NO</b>	APPLICATION 1155 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10928	

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**Result** Discontinued

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*Order*

WHEREAS on 25<sup>th</sup> July 2003 Hanssen Pty Ltd applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979*; and

WHEREAS the matter was listed for hearing on 23<sup>rd</sup> September 2003 and by consent the hearing was vacated and the matter was adjourned sine die; and

WHEREAS on 10<sup>th</sup> March 2004 the Applicant advised the Commission in writing that it would abandon the application and the Commission decided to discontinue the proceedings.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

(Sgd.) J F GREGOR,  
Commissioner.

[L.S.]

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**2004 WAIRC 10650**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ALAN MICHAEL HUDSON	
	-v-	
	KUNUNURRA REGION ECONOMIC ABORIGINAL CORPORATION	<b>APPLICANT</b>
		<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 6 FEBRUARY 2004	
<b>FILE NO/S</b>	APPLICATION 1466 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10650	

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<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr P Brunner of counsel
<b>Respondent</b>	Mr S Phillips of counsel

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*Direction*

HAVING heard Mr P Brunner of counsel on behalf of the applicant and Mr S Phillips of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby directs –

1. THAT where practicable evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
2. THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely no later than 21 days prior to the date of hearing.
3. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 14 days prior to the date of hearing.
4. THAT the parties file and serve upon one another any signed witness statements in reply no later than 7 days prior to the date of hearing.
5. THAT the matter be listed for hearing for two days.
6. THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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**2004 WAIRC 10948**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SALLY ANNE GAUNT	
	-v-	
	EDITH COWAN UNIVERSITY STUDENT GUILD	<b>APPLICANT</b>
		<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	MONDAY, 22 MARCH 2004	
<b>FILE NO</b>	APPLICATION 1573 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10948	

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<b>Result</b>	Order for discovery, inspection and production of documents made.
<b>Catchwords</b>	Practice and procedure – Discovery, inspection and production of documents – Whether right to inspect includes right to make copy – Orders made – Industrial Relations Act 1979 (WA) s 27(1)(o), (v)
<b>Representation</b>	
<b>Applicant</b>	Mrs S.A. Gaunt
<b>Respondent</b>	Mr G. Stubbs (of counsel)

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*Reasons for Decision - Inspection of documents*

- 1 When the application by both Mrs Gaunt and the respondent for production and discovery respectively of documents relevant to the matters before the Commission came on for hearing in Chambers, there was substantial agreement between the parties as to the form and content of the order to issue. This is reflected in the order to issue.
- 2 One matter which was not able to be agreed is the extent to which the Commission may order that a party inspecting a document may also copy that document.
- 3 Section 27(1)(o) gives to the Commission power to make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter including the discovery, inspection or production of documents. The Commission also has the power under s.27(1)(v) generally to give all such directions and to do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter. This latter power enables the Commission to make other procedural orders not covered elsewhere in 27(1): *Robe River Iron Associates v Federated Engine Drivers and Firemen's Union* (1986) 67 WAIG 315 at 317.
- 4 The Commission therefore has the power to order that a party inspecting a document may also copy that document if it is necessary or expedient for the expeditious and just hearing and determination of the matter.
- 5 For example, for a party merely to look at a book which contains the names and addresses of many people is unlikely to assist that party unless the details of those people is able to be recorded or copied by that party in some way. That being so, "inspection" necessarily implies the right to, at a reasonable time and in reasonable circumstances, make a record of the material that is there (*Leslie Park v. The Secretary of the WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers* (1983) 63 WAIG 2228). I am assisted also by the statement by the learned author of Australian Civil Procedure, Bernard Cairns (LBC 4<sup>th</sup> ed., 1996) at page 371 that a party may copy a document produced for inspection.
- 6 In the matter presently before the Commission it does not appear that such voluminous material is to be produced for inspection. Certainly, the parties are agreed that various invoices and payment records, time sheet records, trust account records and notes relating to instructions given and meetings which occurred and the minutes of Guild Senate meetings are involved. The Commission considers it likely that the expeditious and just hearing and determination of the matter will be assisted by a party being able to request copies of a particular document inspected. In reaching that conclusion, I am certainly mindful of the request by Mrs Gaunt that the substantive hearing take place soon after the completion of the inspection process. Providing for a party to copy a document that might be voluminous, or contain detail which does not conveniently lend itself to being copied by hand, will assist in the expeditious hearing and determination of the matter, if not the just hearing and determination of the matter.
- 7 I am of the view therefore that the order to issue should provide that a party may copy a document produced for inspection. The details of how the copying is to be effected and any cost involved are matters which the Commission expects the parties to be able to resolve in the usual professional manner.
- 8 I note that Mrs Gaunt has foreshadowed that she may object to the production of the respondent's files on the ground of legal professional privilege even if the clients' names are obscured. That is a matter to be dealt with if and when that objection is raised. For the assistance of the parties I draw attention to the decision of the Full Bench of this Commission in *Australian Liquor, Hospitality and Miscellaneous Workers' Union v. Burswood Resort Management Ltd and another* (1995) 75 WAIG 1801 where at 1808 the Full Bench stated that:  
 "... documents which would normally be the subject of legal privilege or litigation where practitioners are concerned would be, as a matter of equity, good conscience and the substantial merits of the case, barred from discovery or production to the other side in any proceedings. Otherwise, the result would be unconscionable and in contravention of the requirement that the Commission act according to equity and good conscience."
- 9 The minute of the proposed order now issues.

2004 WAIRC 10964

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	SALLY ANNE GAUNT	<b>APPLICANT</b>
	-v-	
	EDITH COWAN UNIVERSITY STUDENT GUILD	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER A R BEECH	
<b>DATE</b>	THURSDAY, 25 MARCH 2004	
<b>FILE NO</b>	APPLICATION 1573 OF 2003	
<b>CITATION NO.</b>	2004 WAIRC 10964	

<b>Result</b>	Order for discovery, inspection and production of documents made.
<b>Representation</b>	
<b>Applicant</b>	Mrs S.A. Gaunt
<b>Respondent</b>	Mr G. Stubbs (of counsel)

*Order*

WHEREAS applications have been lodged by both parties in the Commission pursuant to Regulation 80 of the *Industrial Relations Commission Regulations 1985*;

AND WHEREAS agreement could not be reached between the parties and the Commission heard the application in Chambers;

AND WHEREAS the Commission is of the view that an order is necessary to provided for the orderly and proper production and inspection of documents relevant to the issues before the Commission prior to the hearing of the matter;

AND HAVING heard Mrs S.A. Gaunt on her own behalf as the applicant and Mr G. Stubbs (of counsel) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

1. THAT by 10 April 2004 the respondent discover to the applicant a list of any documents in its power, custody or possession relevant to the issues of whether or not the applicant was an employee of the respondent including, but not limited to, the following:
  - (a) All financial records relating to payment/salary of the applicant by the respondent in the year 2003.
  - (b) All financial records relating to reimbursement of expenses by the respondent to the applicant in the year 2003 including train fares to Bunbury, stationery materials etc.
  - (c) All financial records relating to trust funds held by the applicant on behalf of the respondent indicating date of entrustment and date of return of funds.
  - (d) All financial records relating to the signage "Guild Legal Advice Services" including receipts for manufacture and sign writing.
  - (e) A paper provided to the respondent by the applicant in approximately August 2003 listing all student clients advised by the applicant whilst in the employ of respondent, at which campus and the nature of the advice.
  - (f) Minutes of all relevant Guild Senate meetings in 2003.
  - (g) All letters or e-mails of resignation indicating the alleged resignation of the applicant and signed by the applicant or identifying the communication as originating with the applicant.
  - (h) Letter stating reasons for dismissal addressed to applicant if any should exist.
2. THAT by 10 April 2004 the applicant shall discover to the respondent a list of any documents in her power, custody or possession relevant to the issues of whether or not she was an employee of the respondent including, but not limited to, the following:
  - (a) The applicant's contract with the respondent.
  - (b) Invoices and payment records.
  - (c) Time sheet records relating to the respondent.
  - (d) Trust account records relating to the respondent.
  - (e) The applicant's tax returns for 2001, 2002 and 2003.
  - (f) Notes relating to instructions given and meetings which occurred between the applicant and the respondent from the time of engagement to termination.
  - (g) The respondent's files (provided that the names of the individual clients may be obscured).
3. Inspection and production of documents in the respective lists shall occur on or before 16 April 2004.
4. Inspection shall occur at the premises of the respondent's solicitors or at any other location agreed between the parties.
5. A party may copy any document inspected.

[L.S.]

(Sgd.) A R BEECH,  
Senior Commissioner.

**2004 WAIRC 11134**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
CATHERINE HILDE ALLEN

**APPLICANT**

-v-

ALOBEAL PTY LTD T/AS THE PROPERTY EXCHANGE

**RESPONDENT**

**CORAM** DEPUTY REGISTRAR D MCLANE  
**DATE OF ORDER** WEDNESDAY, 14 APRIL 2004  
**FILE NO/S** APPLICATION 45 OF 2004  
**CITATION NO.** 2004 WAIRC 11134

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<b>Result</b>	Order issued.
<b>Representation</b>	
<b>Applicant</b>	Mr N Whitehead (of counsel)
<b>Respondent</b>	Mr T Smetana (of counsel)

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*Order*

Pursuant to the powers delegated to me under s.96 and further to the conference pursuant to s.32 held before me, Deputy Registrar D C McLane on Monday 29<sup>th</sup> March, 2004 and being of the opinion that an Order is necessary to assist the parties to reach an agreement on the terms for the resolution of the matter I hereby order:

1. That the Respondent makes available to the Applicant all documents relating to offers and acceptances on listings and summaries of payments detailing properties sold by the Applicant for the financial years of 2002/2003 and 2003/2004.
2. That the Respondent makes available to the Applicant a printout detailing the advertising budget relating to the Applicant for the financial years of 2002/2003 and 2003/2004.
3. That the Respondent makes available to the Applicant all contracts and any other documents in its possession that specifically relate to the Applicants salary.
4. That the Respondent makes available to the Applicant a printout of letting fees that relate to the Applicant for the financial years of 2002/2003 and 2003/2004.
5. That the Applicant makes available to the Respondent any pay slips that she possesses for the financial years of 2002/2003 and 2003/2004.
6. That the Applicant makes available to the Respondent all bank account details of salary deposits for the financial years of 2002/2003 and 2003/2004.
7. That Mr Whitehead shall attend the office of Mr Smetana, at a time to be mutually agreed, where both parties shall inspect and identify any documents required from the documents referred to above.
8. That any such document identified and required by a party shall be made available to that party, any photo copying of documents that are required by either party shall be charged for at the rate of twenty five cents per page.

[L.S.]

(Sgd.) D. McLane,  
Deputy Registrar.

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**2004 WAIRC 11080**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JENNIFER LORRAINE MCKAY	<b>APPLICANT</b>
	-v-	
	THE COMMISSIONER OF POLICE	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER W S COLEMAN	
<b>DATE</b>	MONDAY, 5 APRIL 2004	
<b>FILE NO/S</b>	APPLICATION 452 OF 2004	
<b>CITATION NO.</b>	2004 WAIRC 11080	

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<b>Result</b>	Directions Order issued
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*Order*

PURSUANT TO the powers conferred on it by Part IIB of the *Police Act 1892* and the *Industrial Relations Act 1979*, the Commission hereby orders:

1. That the Appellant file two copies in the office of the Registrar, and serve one copy of the Notice of Application of Appeal on the Respondent within seven (7) days of the date of this order.
2. Within twenty-eight (28) days of the date of this Order the Respondent shall file three copies of an answer in the office of the Registrar and serve one copy on the Appellant.
3. The Respondent's answer shall set out –
  - (a) The Respondent's reasons for deciding to take removal action, together with a summary of facts or issues of law relied upon by the Respondent including any relevant matters set out in s 33Q(4) of the *Police Act*; and
  - (b) any matters the Respondent wishes to raise in reply to the Appellant's case.
4. At the time of filing an answer, the Respondent shall file in the office of the Registrar and serve on the Appellant:
  - (a) a list and copy of all materials that were examined and taken into account by the Respondent in making his decision to take removal action; and
  - (b) a copy of the notices given by the Respondent under section 33L(1) and (3) of the *Police Act 1892*.

5. Within twenty one (21) days of filing an answer the parties shall file with the Registrar
- (a) a list and copy of any new evidence agreed to be adduced by consent of the parties; and
  - (b) a list and copy of any other new evidence sought to be adduced and the grounds on which leave will be sought to tender that evidence.
6. Liberty to apply.

[L.S.]

(Sgd.) W S COLEMAN,  
Chief Commissioner.**2004 WAIRC 11039****HOSPITAL SALARIED OFFICERS' AWARD 1968**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)

**APPLICANT**

-v-

HON MINISTER FOR HEALTH IN HIS CAPACITY AS THE HOSPITAL BOARD FOR METROPOLITAN HEALTH SERVICES AND OTHERS

**RESPONDENT****CORAM**COMMISSIONER P E SCOTT  
PUBLIC SERVICE ARBITRATOR**DATE OF ORDER**

FRIDAY, 2 APRIL 2004

**FILE NO**

P 18 OF 2003

**CITATION NO.**

2004 WAIRC 11039

**Result**

Directions Issued

*Directions*

WHEREAS this is an application before the Public Service Arbitrator ("the Arbitrator") to vary the Hospital Salaried Officers' Award No. 39 of 1968; and

WHEREAS on the 2<sup>nd</sup> day of April 2004, the Arbitrator convened a conference for the purpose of the parties reporting back to the Arbitrator; and

WHEREAS at the conference the Applicant requested that the Arbitrator issue directions regarding the timeframes for progressing the application and the Respondent did not oppose directions being issued;

NOW THEREFORE the Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby directs:

1. THAT the Respondent shall, by close of business on the 23<sup>rd</sup> day of April 2004, advise the Applicant of the details of the staffing and associated resources which have been allocated to completing the processes outlined in the letter from the Department of Health to the Health Services Union dated the 9<sup>th</sup> day of December 2003.
2. THAT the parties shall, by close of business on the 30<sup>th</sup> day of April 2004, consult and agree on a schedule of all classifications and callings that are to be included in the scope of the application.
3. THAT the Respondent shall, by close of business on the 7<sup>th</sup> day of May 2004, provide to the Applicant a list of all positions included in the scope of the application. The list shall include the following position details:
  - (i) Post number
  - (ii) Title
  - (iii) Classification
  - (iv) Full time equivalent status
  - (v) Name of current occupant
  - (vi) Location by Health Service and Department
4. THAT the parties shall, by close of business on the 30<sup>th</sup> day of April 2004, draft a memorandum of understanding detailing an agreed process and timetable for the completion of this application as outlined in the letter from the Department of Health to the Health Service Union dated the 9<sup>th</sup> day of December 2003.

(Sgd.) P E SCOTT,  
Commissioner,  
Public Service Appeal Board.

[L.S.]

**ENTERPRISE BARGAINING AGREEMENT—Notation of—**

<b>Agreement Name/Number</b>	<b>Date of Registration</b>	<b>Parties</b>		<b>Commissioner</b>	<b>Result</b>
Bibra Lake Fabrication Workshop Enterprise Agreement 2003 AG 17/2004	26/03/2004	Co-operative Bulk Handling Limited	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Gregor C	Agreement Registered
Harnischfeger of Australia Pty Ltd Western Region Workshop, Repair, Manufacture and Field, Assembly, Repair and Maintenance Agreement 2003 AG 38/2004	26/03/2004	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Harnischfeger of Australia Pty Ltd	Gregor C	Agreement Registered
Pioneer Construction Materials Tip Truck and Tanker Drivers Agreement 2004 AG 19/2004	5/04/2004	Pioneer Construction Materials Pty Ltd	Transport Workers' Union of Australia, Industrial Union of Workers - Western Australian Branch	Smith C	Agreement Registered
Sandvik Materials Handling Enterprise Bargaining Agreement 2003 AG 2/2004	12/03/2004	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Sandvik Materials Handling	Smith C	Agreement Registered
Sotico Pty Ltd Enterprise Agreement 2003 AG 288/2003	8/03/2004	Sotico Pty Ltd	The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch	Smith C	Agreement Registered
Stramit Building Products Western Australia Enterprise Bargaining Agreement 2003 AG 32/2004	5/04/2004	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Amtel Pty Ltd trading as Stramit Building Products	Gregor C	Agreement Registered
WA Government Health Services Engineering and Building Services Enterprise Agreement 2004 AG 20/2004	22/03/2004	The Minister for Health	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, The Construction, Forestry, Mining and Energy Union of Workers, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Scott C	Agreement Registered

## NOTICES—Appointments—

### APPOINTMENT

#### ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner J L Harrison to be an additional Public Service Arbitrator for a period of one year from the 27<sup>th</sup> April 2004.

Dated the 19<sup>th</sup> day of April, 2004

[L.S.]

(Sgd.) W S COLEMAN,  
Chief Commissioner.

## NOTICES—Cancellation of Awards/Agreements/ Respondents—under Section 47—

### NOTICE

#### WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends, by order, to strike out the following party to the Materials Testing Employees' Award, 1984 namely:

Oilfield Inspection Services (Australia) Pty. Ltd.

on the grounds that the named employer is no longer carrying on business as an employer or is no longer in the industry to which the award applies.

Any person who has sufficient interest in the matter may, within 30 days of the publication of this notice, object to the Commission making such order.

Please quote File No. 76/80/223 on all correspondence.

[L.S.]

(Sgd.) J. SPURLING,  
Registrar.

7 April, 2004

Editor's Note: Please note that this Notice replaces the Notice published at 83 WAIG 3240.

## RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 11 of 2002	Oskar Raymond Tollefsen	CEO Mains Roads WA	Beech SC	Discontinued	16/4/04
PSA 12 of 2002	Mary Blake	Graylands Selby-Lemnos	Beech SC	Discontinued	15/4/04
PSA 14 of 2002	Sean Fraser Draper	Womens' & Childrens' Health Services	Beech SC	Discontinued	16/4/04
PSA 15 of 2002	Elizabeth Maria Fitzgerald	Womens' & Children's Health Services	Beech SC	Discontinued	15/4/04
PSA 26 of 2003	Sharon Cattermole	Challenger TAFE	Beech SC	Discontinued	15/4/04
PSA 27 of 2003	Alice Bahlinger	Challenger TAFE	Beech SC	Discontinued	15/4/04
PSA 28 of 2003	Rechelle Williamson	Challenger TAFE	Beech SC	Discontinued	15/4/04
PSA 37 of 2003	Ray Milan	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 38 of 2003	Peter Beattie	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 39 of 2003	Norman Snashall	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 40 of 2003	Michael Lock	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 41 of 2003	Susan Matthews	Dept for Planning & Infrastructure	Beech SC	Discontinued	15/4/04
PSA 42 of 2003	Bruce Bailey	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 43 of 2003	Kevin Deacon	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 44 of 2003	Robert Donovan	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04

<b>File Number</b>	<b>Appellant</b>	<b>Respondent</b>	<b>Commissioner</b>	<b>Decision</b>	<b>Finalisation Date</b>
PSA 45 of 2003	John Phillips	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 46 of 2003	Rodney Bishop	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 47 of 2003	Raymond Forster	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 48 of 2003	David Philpot	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 49 of 2002	Ross Lillywhite	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 50 of 2002	Gary Johannesen	Dept for Planning & Infrastructure	Beech SC	Discontinued	16/4/04
PSA 68 of 2003	Sam Anthony Grech	Minister for Health in Right of the Metropolitan Health Service	Scott C	Dismissed	08/04/04

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